HUGONIS GROTII

DE JURE BELLI ET PACIS

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HUGONIS GROTII

DE JURE BELLI ET PACIS

LIBRI TRES

ACCOMPANIED BY AN ABRIDGED TRANSLATION

BY

WILLIAM WHEWELL D.D.

MASTER OF TRINITY COLLEGE

AND PROFESSOR OF MORAL PHILOSOPHY IN THE UNIVERSITY OF CAMBRIDGE:

WITH THE NOTES OF THE AUTHOR, BARBEYRAC, AND OTHERS.

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LIBRI SECUNDI

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HUGONIS GROTII
DE JURE BELLI AC PACIS.
LIBER SECUNDUS.
CAPUT IX.
QUANDO IMPERIA VEL DOMINIA DESINANT.

I. *Dominium et imperium tolli sublato eo qui jus habuit, nec existente successore:*
II. *Sic et jus familiæ exstincta familia:*
III. *Sic et populi, si populus esse desinat:*
IV. *Quod fit, sublatis partibus necessariis:*
V. *Sublato corpore toto populi:*
VI. *Sublata forma, qua est populus:*
VII. *Non etiam migratione:*
VIII. *Aut mutato regimine: ubi de loco qui debeatur novo regi aut populo liberato.*
IX. *Quid si populi uniantur?*
X. *Quid si dividatur populus?*
XI. *Cujus nunc sint quæ Romani imperii fuerunt, nec alienata apparent.*
XII. *De jure heredum.*
XIII. *De jure victoris.*

I. QUOMODO primitus acquirantur, et quomodo transeant tum dominia privata, tum imperia, satis diximus: quomodo desinant, videamus. Et quidem derelictione desinere obiter supra demonstratum est, quia voluntate cessante non manet dominium. Est et alius desinendi modus, sublato subjecto [1] in quo est imperium vel dominium, ante alienationem scilicet vel expressam vel tacitam, qualis est in successionibus ab intestato. Quare si qua persona, nulla edita

[1] Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. 6. § 14. Lib. VI. cap. 3. § 11. et Lib. VIII. cap. 11. § 1. *J. B.*

CHAPTER IX. *When Lordship and Ownership cease to exist.*

I. We have sufficiently explained how both private ownership and public authority is acquired, and how it is transferred; let us now consider how it ceases.

That it ceases by derelict, is above shewn in passing; because the will ceasing, the ownership does not remain. There is also another mode of its ending: the subject or person in whom the lordship or ownership resides being removed, that is, before alienation either express at least, or tacit, such as there is in successions to intestates.

voluntatis significatione, nullo consanguineo relicto, moriatur, omne jus quod habet interit, ac proinde servi (nisi lex humana impediat) erunt liberi: populi qui in ditione ejus fuerant sui juris fient; quia non sunt hæc sui natura occupabilia: nisi libertatem suam ultro deserant: res autem aliæ fient occupantis.

II. Idem dicendum [a] si familia defecerit, quæ jus aliquod habebat.

De Pace, p. 183 D.

III. 1 Idem, si populus. Dixit Isocrates, et post eum [2] Julianus imperator, civitates esse immortales, id est, esse posse, quia scilicet populus est ex eo corporum genere, quod

L. Rer. 30. *D. de Usurp. et Usuc.*

[a] *Si familia defecerit*] Ut Danica olim Crantz. *Vand.* VIII. 22. Rugia. Crantzius idem *Vand.* VIII. 12. Pelasgorum et Thessalorum. Gregoras Lib. VII. (*in fin.* pag. 127. *Ed. Colon.* 1616). Usumcassanidarum in Perside Leunclavius XVI. Adde Leonem Lib. 11. Africanorum (pag. 136. *Ed. Elzevir.*) *de Tarodanto :* et si vis, Ernestum Cothmannum cons. xli. num. 1. et sequentibus.

[2] Locus est in Epistola *pro Argivis :* Τὰς πόλεις δὲ ἀθανάτους οὔσας etc. Pag. 411 B. *Ed. Spanh. J. B.*

[b] *Ex distantibus*] Seneca epistola CII. *quædam continua esse corpora, ut hominem : quædam composita, ut navem, domum, omnia denique quorum partes diversæ junctura in unum sunt coactæ : quædam ex distantibus, quorum adhuc membra separata sunt, tanquam exercitus, populus, senatus.* Sumta hæc ex Achille Tatio, cujus ad Aratum hæc sunt verba, (cap. xiv. *Ed. Petav.*) ex Conone illo, cujus repertum est coma Berenices: παρετήρησε δὲ Κόνων ὁ μαθηματικὸς, σώματα λέγεσθαι ὅσα ὑπὸ μιᾶς ἕξεως ἡνωμένα κρατεῖται, οἷον λίθος, ξύλον. ἔστι δὲ ἕξις πνεῦμα σώματος συνεκτικόν. συνημμένα δὲ ὅσα οὐχ ὑπὸ μιᾶς ἕξεως δέδεται, ὡς πλοῖον καὶ οἰκία. τὸ μὲν γὰρ ἐκ πολλῶν σανίδων, ἡ δὲ ἐκ πολλῶν λίθων σύγκειται, διεστῶτα δὲ, ὡς χορός. τῶν δὲ τοιούτων διτταὶ αἱ διαφοραί. τὰ μὲν γὰρ ἐξ ὡρισμένων σωμάτων καὶ ἀριθμῷ ληπτῶν, ὡς χορός. τὰ δὲ ἐξ ἀορίστων, ὡς ὄχλος· *Observavit mathematicus Conon, corpora dici quæ uno tenore unum fiunt. Est autem tenor spiritus corpus continens. Connexa vero, quæ non uno tenore juncta sunt, ut navis, ut domus : nam et illa ex multis est tabulis, et hæc ex lapidibus multis : distantia ut chorus : sed et hæc duum generum inter se differentium. Sunt enim alia ex corporibus definitis et quæ numerum habent cognitu facilem, ut chorus : alia ex infinitis, ut populus.* Apparet hinc sumta

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Wherefore if any person die without giving any indication of his will, and without leaving any relative, every right which he had perishes, and therefore his slaves (except some human law prevent it) will be free; the peoples who had been under his authority will be their own masters, because these things (slaves and governments) are not things which can be taken possession of by the first comer; but his other property may be so *occupied.*

II. The same which we have said of a person may be said of a Family which fails, and which had any rights.

III. 1 The same, if a People fails. Isocrates, and after him the Emperor Julian said, that states are immortal; that is, that they may be so; because a People is that kind of body which consists of separate

[b]ex distantibus constat, unique nomini subjectum est, quod habet ἕξιν μίαν, ut Plutarchus; spiritum unum, ut Paulus Jurisconsultus loquitur. [c]Is autem spiritus, sive ἕξις, in populo est vitæ civilis consociatio plena atque perfecta, cujus prima productio est summum imperium, vinculum per quod respublica cohæret, spiritus vitalis quem tot millia trahunt, ut Seneca loquitur. Plane autem corpora hæc artificialia instar habent corporis naturalis. Corpus naturale idem esse non desinit, [d]particulis paulatim commutatis, una manente specie, ut Alphenus ex philosophis disserit.

De Anim. Proc. p. 1025
c. *L.* 23. § 5. *D. De Rei Vind.*
Sen. Lib. i. *De Clem.* c. 4.
L. 76. *De Judic.*

2 Atque ideo commode interpretandum, quod ait Seneca, *Epist.* 58.

quæ habet Pomponius L. rerum. 30. de usurp. et usucap. et quod Paulus dicit statuam uno spiritu contineri l. in rem. *De Rei Vind.* 23. § item. 5. ubi similiter distinguit inter corpora cohærentia et quæ sunt ex distantibus. Usi et alii. Philo *de Mundo* (pag. 1154 E): *ἕξις ἐστὶ πνεῦμα ἀναστρέφον ἐφ' ἑαυτῷ· tenor est spiritus in semet se revolvens,* etc. item: *ἕξις ἐστὶ πνευματικὸς τόνος, δεσμὸς οὐκ ἄῤῥηκτος· ἀλλὰ μόνον δυσδιάλυτος· Tenor est spiritualis continentia, vinculum non insolubile, sed solutu difficile.* (Pag. 1169 A). Vide et Boethium I. arithmeticorum: (cap. I.) et nota cum de populo *ἕξιν* aut spiritum dicimus, non sumere nos vocem in suo rigore, ut Conon fecit, sed *ἀναλογικῶς*, comparatione quadam, quali utimur etiam cum populum corpus appellamus. Spiritum hunc rei speciem vocat Alfenus in l. proponebatur. 76. D. de judiciis.

[c] *Is autem spiritus, sive ἕξις, in populo*] Ἡ πολιτεία, βίος πόλεως. Aristoteles *Polit.* IV. 11.

[d] *Particulis paulatim commutatis*] Exemplum in navi dat Alfenus dicto jam loco, et Ulpianus in l. quid tamen 10. D. quibus modis ususfructus amittatur. Navem eandem esse aiunt, si per partes refecta sit. Aliud si dissoluta et recomposita. l. qui res. 98. § aream. 8. D. de solutionibus, Plutarchus *Theseo:* *τὸ δὲ πλοῖον ἐν ᾧ μετὰ τῶν ἠιθέων ἔπλευσε καὶ πάλιν ἐσώθη, τὴν τριηκόντορον, ἄχρι τῶν Δημητρίου τοῦ Φαληρέως χρόνων διεφύλαττον οἱ Ἀθηναῖοι, τὰ μὲν παλαιὰ τῶν ξύλων ὑφαιροῦντες, ἄλλα δὲ ἐμβάλλοντες ἰσχυρὰ, καὶ συμπηγνύντες, οὕτως ὥστε καὶ τοῖς φιλοσόφοις εἰς τὸν αὐξόμενον* [legendum *αὐξομένων*, ut habet MS.] *λόγον ἀμφιδοξούμενον παράδειγμα τὸ πλοῖον εἶναι, τῶν μὲν ὡς τὸ αὐτὸ, τῶν δὲ ὡς οὐ τὸ αὐτὸ διαμένει, λεγόντων· Navem autem, in qua cum delecta juventute navigavit salvusque rediit Theseus,*

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elements, but is subject to one name, and has *one habit*, as Plutarch says, one spirit, as Paulus. This spirit or habit in a people is the full and perfect common participation of civil life; the first production of which is the sovereignty, the bond by which the State is held together, the vital breath drawn by so many thousands, as Seneca speaks. And these artificial bodies have plainly an analogy with natural bodies. A natural body does not cease to be the same, though the particles are gradually changed, the *Form* remaining the same, as Alphenus, after the philosophers, discourses.

2 And thus we can explain what Seneca says, that no one of us is the same in age which he was in youth, this being understood of the

neminem nostrum eundem esse in senectute, qui fuit juvenis, ut de materia sola intelligatur; [c] quomodo Heraclitus dixerat, citante Platone in *Cratylo*, et Seneca dicto loco, in
p. 402 A. idem flumen bis nos non descendere: quod recte sic corrigit Seneca: *Manet idem fluminis nomen, aqua transmissa est.*
Pol. iii. 3. Sicut et Aristoteles flumen populo comparans dixit, flumina eadem vocari quanquam alia subeat semper aqua, alia decedat. Neque vero manet nomen inane: sed et ἕξις illa, quam Conon definit ἕξιν σώματος συνεκτικὴν, Philo πνευματικὸν συνέχον, Latine quoque spiritum vocant. Sic ergo
p. 559 A. populus, Auctore Alpheno et Plutarcho de sera numinis vindicta, idem hoc tempore putatur qui abhinc centum annis fuit, cum ex illis nemo nunc vivit: *μέχρις ἂν ἡ ποιοῦσα καὶ συνδέουσα ταῖς ἐπιπλοκαῖς κοινωνία τὴν ἑνότητα διαφυλάττῃ· quamdiu illa, quæ populum facit et mutuis nexibus vincit, communio jus unitatis suæ servat;* quæ ejusdem Plutarchi in hac re verba sunt. Et hinc ortus mos loquendi,

triginta aptam remis conservarunt Athenienses ad usque tempora Demetrii Phalerensis, subtrahendo ligna vetustate cariosa, subjiciendo alia, ita ut cohærerent, unde et exemplum hæc navis facta est philosophis disputantibus de ea quæstione, quæ de augescentibus dicitur, in qua hanc navem ad ultima tempora eandem fuisse affirmant hi, illi negant. (Pag. 10 c.) In hac controversia a philosophis decertata prudenter Jurisconsulti aientem partem prætulere. Et Tertullianus juris valde peritus libro *de Resurrectione Carnis* (cap. 60): *Navem procella dissipatam vel carie dissolutam, redactis et recuratis omnibus membris, eandem sæpe conspeximus, etiam titulo restitutionis gloriantem.* Intellige manente carina, quomodo vox *resoluta* [Immo *dissolvit*] etiam sumenda in Pauli verbis l. inter stipulantem. 73. § sacram. 5. D. de verb. oblig. Idque et apud Tertullianum præcedentia, et apud Paulum sequentia evincunt. Philo *de*

matter of which we consist; as Heraclitus said, according to the quotation of Plato in the *Cratylus*, and Seneca in the above cited place, that we cannot bathe twice in the same river: which Seneca rightly corrects, by saying the name of the river remains, the water passes. So Aristotle, comparing a river to a people, says, that rivers are called the same, though new water is constantly coming in, old water going out. Nor is it the empty name which remains; but that habit, which Conon defines as a *habit holding the body together,* and Philo, as a *spiritual bond,* and which the Latins also call *the spirit* of the thing. Thus a People, as Alphenus and Plutarch say, is reckoned the same now as it was a hundred years ago, though none of those who lived then is alive now, *As long as that communion which makes a people and binds it together with mutual bonds preserves its unity,* as Plutarch expresses it. And hence arises the mode of speaking, that when we address a people now existing, we attribute to it what happened to the same People several

ut populum qui nunc est alloquentis, ei tribuamus quæ eidem populo ante multa sæcula acciderunt, ut videre est tum apud historicos, tum et [f]in libris sacris, ut Marci x. 3. Joh. vi. 32. vii. 19, 22. Actor. vii. 38. Sic apud Tacitum Antonius Primus Vespasiano militans milites Tertianos veterum admonet, *ut sub M. Antonio Parthos, sub Corbulone Armenios repulissent.* *Hist.* iii. 24.

3 Ex odio itaque, non ex vero apud eundem Tacitum Piso [g] negat Athenienses sui temporis esse Athenienses, quippe tot cladibus extinctos, sed illuviem nationum. Nam externa illa accessio de dignitate forte aliquid detraxerat, populum alium non fecerat. Nec id is ipse ignoravit, cum illis ipsis sui temporis Atheniensibus objectaret vetera, quæ in Macedonas improspere, violenter in suos fecissent. At sicut particularum mutatio non efficit ut populus esse desinat qui fuit, nec per annos quidem mille et amplius, ita fieri posse ut intereat populus negari non potest. Fit autem hoc dupli-

Mundo: οὐ γὰρ δήπουθεν οὗ πάντα τὰ μέρη φθείρεται, φθαρτόν ἐστιν ἐκεῖνο, ἀλλ' οὗ πάντα τὰ μέρη ἅμα καὶ ἐν ταυτῷ ἄθροα κατὰ τὸν αὐτὸν χρόνον. *Non cujus partes pereunt utique interitui obnoxium est, sed cujus omnes partes simul et eodem tempore pereunt.* (Pag. 1171 E.)

[e] *Quomodo Heraclitus*] Et Epicharmus apud Diogenem Laertium. (Lib. III. § 11).

[f] *In libris sacris*] Adde Matth. xxiii. 35; Act. iii. 22.

[g] *Negat Athenienses sui temporis esse Athenienses*] Contra de iisdem Atheniensibus Julianus *Misopogone*. [Nil de Atheniensibus in Libro illo, qui adversus Antiochenses scriptus est. In animo forte habuit Auctor, quæ Julianus dicit in *Epist. ad Athenienses*, ab initio, pag. 268, 269. *Ed. Spanhem. J. B.*]

generations ago; as we may see both in the historians, and in the Scriptures. [See the passages.] So in Tacitus, Antonius Primus reminds the veterans of the Third Legion, that, *Under M. Antonius, they had repelled the Parthians, under Corbulo, the Armenians.*

3 It is therefore through spite, and not as speaking truly, that in the same Tacitus, Piso denies that the Athenians of his time are the Athenians, those being extinct by a succession of calamities; and says, that they are a mixture of the dregs of nations. For that accession of strangers had perhaps detracted something from the dignity of the people, but had not made it another people. Nor was he ignorant of this, since on those very Athenians of his time he charged the old faults which they had committed, their failures against the Macedonians, their violence against their own citizens.

But while the change of component parts does not make a people cease to be what it was, even for above a thousand years; it cannot be denied that a people may cease to be: and this may happen in

citer, interitu corporis, aut interitu speciei sive spiritus quem dixi.

IV. Corpus interit, [h] vel sublatis simul partibus, sine quibus corpus subsistere nequit, vel sublata corporis ratione. Ad priorem modum refer populos mari abreptos, ut Atlanticæ populos, teste Platone, [i] et alios quorum Tertullianus meminit, item eos quos terræ motus hausit penitus, aut chasma, quorum exempla sunt apud Senecam et Ammianum Marcellinum, et alibi: et qui sponte internecioni se dederunt, ut Sidonii et Saguntini. Ex antiquo Latio LIII. populos sine vestigiis interiisse, ait Plinius. Quid si ex tali populo tam pauci supersint, qui populum facere nequeant? jam poterit in illis subsistere dominium quod populus habet ad modum privatorum: non siquid populo ut populo competit: quod et de collegio sentiendum est.

p. 25 c. Tom. III. *L. de Pall.* p. 39. *Epist.* 91. Lib. xvii. 7.

Diod. xvi. *Bibl.* 45. Liv. xxi. 14. *Hist. Nat.* iii. 5.

L. 7. § *ult.* *D. Quod cuj. Univ.* n. *L.* 12. § 13. *D. de Capt.*

[h] *Vel sublatis partibus, sine quibus corpus consistere nequit, vel sublata corporis ratione*] Servius in Fuldensibus excerptis ad I. *Æneidos*: *Duobus generibus deletur exercitus, aut internecione, aut dispersione.* (Ad vers. 70).

[i] *Et alios quorum Tertullianus meminit*] Myunta apud Vitruvium (*De Architect.* IV. 1): Helicen et Burin apud Pausaniam (VII. 25), Strabonem (*Geogr.* I. p. 59), Senecam naturalium quæstionum libro VI. c. 23. et 31. et in *Anthologia.*

[k] *Aut vi ita distrahantur*] Philo dicto jam libro *de Mundo*: *τὰ μὲν ἐκ διεστηκότων, αἰπολία, βουκόλια, χοροὶ, στρατεύματα, ἢ πάλιν ἐκ συναπτομένων σώματα παγέντα, τῇ διαστάσει*

two ways; by the destruction of the body, or by the departure of the *form* or spirit of which I have spoken.

IV. The body is destroyed, either by the simultaneous removal of the parts, without which the body cannot subsist, or by taking away their connexion as a body. To the former mode, you must refer peoples swept away by the sea, as the peoples of the island of Atlantis, of whom Plato speaks, and others whom Tertullian mentions. Also such as have been swallowed up by an earthquake or a chasm opened in the ground, of which there are examples in Seneca and Ammianus Marcellinus, and elsewhere: and those who voluntarily destroyed themselves, as the Sidonians and the Saguntines. Pliny says that fifty-three Peoples of ancient Latium perished, leaving no trace.

If, of such a people, so few survive that they cannot make a People, what are we to say? In that case, the ownership which the people had in the way of private persons may subsist; but not anything which belongs to a people as a people: and the same may be said of a College or Corporation.

V. The connexion of the parts of the body is taken away, if the citizens either break up their society spontaneously on account of pes-

V. Corporis ratio tollitur, si cives aut sponte ob pestilentiam aut seditionem a societate discedant, [k]aut vi ita distrahantur ut coire non possint, quod bellis accidit interdum.

VI. Species interit, sublata aut omni aut perfecta juris communitate, sive singuli personalem quoque servitutem subeant, ut Mycenæi ab Argivis, Olynthii a Philippo, Thebani ab Alexandro venditi, Brutii a Romanis publicis servitiis mancipati, sive ea retenta imperio exuantur. Sic de Capua narrat Livius placuisse Romanis, ut tanquam urbs habitaretur; corpus nullum civitatis, nec senatus, nec plebis concilium, nec magistratus esse, sed sine consilio publico, sine imperio multitudinem, [l]cui præfectus Roma missus jus redderet. Itaque [m]imaginem reipublicæ nullam Capuæ relictam dicit Cicero, priore ad populum contra Rullum. Idem dicendum de populis in provinciæ formam redactis: item de his

Arist. *Pol.* iii. 2.

[[Diodor. Sic. xi. 65: xvi. 541: xvii. 14.]]

Lib. xxvi. 16.

Cic. i. *contr. Rull.* c. 32.

καὶ διαιρέσει λύονται· *Quæ ex distantibus sunt, ut greges, armenta, chori, exercitus, non minus quam corpora ex connexis in unum coacta, divortio ac dissolutione intereunt.* (Pag. 952 D.) Vide quæ supra de navi.

[l] *Cui præfectus Romæ missus jus redderet*] Vide Festum voce præfecturæ. *Velleius*, libro. II. c. 44. *Jus his restitutum post annos circiter* CLII. *quam bello Punico a Romanis Capua in formam præfecturæ redacta erat:* adde exempla in textu et notis allata ad libri I. c. 3. § 8.

[m] *Imaginem reipublicæ nullam*] Severus jus buleutarum dedit Alexandrinis, qui sine publico consilio vixerant sub juridico. [*Spartian.* c. 17.]

tilence or sedition; or be so distracted by force that they cannot come together; which happens sometimes in war.

VI. The *form* of a People is taken away, when the participation in common rights no longer subsists, either at all, or at least, perfectly: whether individuals are reduced into a state of personal slavery, as the Myceneans sold by the Argives, the Olynthians by Philip, the Thebans by Alexander, the Bruttians sentenced to slavery at public works by the Romans; or retaining their liberty* are deprived of their political power. Thus Livy relates of Capua, that the Romans determined that it should be inhabited as a hamlet merely, with no municipal body, no senate, no assembly of the people, no magistrates; a collection of individuals without authority, among whom a judge sent from Rome should administer justice; and accordingly Cicero says, that there was no image of a State left at Capua. The same is to be said of peoples reduced into the form of a province, and of those who are brought under the authority of another people. Thus Byzantium was put under Perinthus by Severus, and Antiochia under Laodicea by Theodosius.

* *Ea retenta* is plainly to be understood as *libertate retenta*. W.

qui alterius populi ditionem subierunt. Sic [n]a Severo Byzantium Perintho, [o]Antiochia Laodiceæ supposita a Theodosio.

Theod. *Hist. Eccl.* v. c. 20. Zon. *in Val. et Theod.* Flor. ii. 15.

VII. At vero si loco migraverit populus, sive sponte ob inediam, aut alia mala; sive coactus, ut populus Carthaginensis bello Punico tertio, si species quæ dixi maneat, [p] populus esse non desinit, multoque minus si muri tantum urbis disjecti sunt. Itaque cum ad pacem Græciæ jurandam Lacedæmonii negarent admittendos Messenios, quod ejus urbis muri essent diruti, contra eos a communi sociorum concilio res judicata est.

Plut. *Ages.* p. 616 B.

VIII. 1 Neque refert quomodo gubernetur, regione, an plurium, an multitudinis imperio. Idem enim est populus Romanus sub regibus, consulibus, Imperatoribus. Imo etiamsi plenissimo jure regnetur, populus idem erit qui antea erat cum sui esset juris, dum rex ei præsit, ut caput istius populi, non ut caput alterius populi. Nam imperium quod in rege est ut in capite, in populo manet ut in toto, cujus pars est caput: atque adeo rege, si electus est, aut regis familia extincta, jus imperandi ad populum redit, ut supra ostendimus. Neque

[n] *A Severo*] Vide Xiphilinum *Severo: Herodianum,* libro III. (c. 6) adde quæ infra hoc libro II. cap. XXI. § 7.

[o] *Antiochia Laodiceæ supposita*]

VII. If the People migrate from its place, either of its own will, on account of famine, or other calamity; or under compulsion, as the Carthaginian people in the third Punic war, if the form of which I have spoken remain, the people does not cease to be; still less, if the walls of the city only are thrown down. Therefore when the Lacedæmonians would have excluded the Messenians from being admitted among those who were to swear to the peace of Greece, because their city-walls were destroyed, the matter was decided against them by the common council of the allies.

VIII. 1 Nor does it make any difference how the people is governed, whether by the authority of a king, or that of a number, or that of the multitude. The Roman people was the same under kings, consuls, emperors. Even if the king govern with the most absolute power, the people will be the same which it was before, when it was its own master; provided the king is set over it as the head of that people, not as the head of another people. For the authority which is in the king as the head, is in the people as the whole body, of which the head is a part: and therefore when the king, if he be elective, or the king's family, is extinct, the supreme authority reverts to the people, as we have shewn above.

Nor is the objection from Aristotle valid; when he says that the

est quod Aristotelem hic mihi quis objiciat, qui reipublicæ forma mutata negat eandem esse civitatem, sicut, inquit, harmonia non eadem est ubi a Dorico modo in Phrygium transitur. *Pol.* iii. 3.

2 Sciendum enim est unius rei artificialis plures esse posse species, sicut legionis species una est qua regitur, altera qua militat. Ita civitatis species una est, consociatio juris atque imperii; altera, relatio partium inter se earum quæ regunt, et quæ reguntur. Hanc spectat politicus, illam jurisconsultus: quod nec Aristotelem latuit cum ita subjicit: *an vero exsolvenda sint nomina necne, mutata gubernandi forma, alia inspectio est:* artis scilicet alterius, quam cum politica non confundit Aristoteles, ne quod in aliis culpat admittat ipse, *μεταβαίνων ἐκ γένους εἰς γένος, ab uno tractandi genere ad alterum transitum faciens.* *D.* 3. *Pol.* iii.

3 Non desinit debere pecuniam populus, rege sibi imposito, quam liber debebat: est enim idem populus, et dominium retinet eorum quæ populi fuerant, imo et imperium in se retinet, quanquam jam non exercendum a corpore, sed a capite:

Vide Zonaram. (Lib. XIII. cap. 18.)

p *Populus esse non desinit*] Ut Geloi Phintiada translati. Diodorus Siculus in fragmentis Peirescianis. [Immo in prioribus, *Excerpt.* e Lib. XXII.]

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form of the State being changed, the State is no longer the same; as, says he, the harmony is not the same when we modulate out of the Dorian mood into the Phrygian [though the notes may be the same].

2 For it is to be understood that an artificial thing may have several *forms;* thus, one *form* of a legion (or regiment) is its government by *legati, tribuni, centuriones;* (colonels, captains, serjeants, &c.): another form of the same body is its order of march or of battle. Thus one *form* of a State is the common participation of right and authority; and another is the relation of the parts governing and governed. The politician looks at the latter form, the jurist at the former: and Aristotle was aware of this, when he subjoins, *Whether the name* (of the State) *is to be changed when the form of government is changed, is another inquiry:* that is, it belongs to another science [*Jus*], which Aristotle does not confound with Political Science (*Politica*), that he may not commit the fault which he blames in others, of *passing to another genus.*

3 When a People has a king placed ever it, it does not cease to owe the moneys which it owed being free: for it is the same people, and retains the ownership of the things which had belonged to the people; and also authority over itself, though this authority is not

unde parata est responsio ad controversiam ex facto nonnunquam agitatam, quo loco in conventibus sedere debeat qui summum imperium in populum ante liberum accepit: eodem nimirum quo ipse populus: sicut in Amphictyonico consessu Phocensium [3] locum accepit Philippus Macedo: sic vicissim qui regis fuerat locus, eum populus liber implebit.

IX. Quod si quando [q] uniantur duo populi, non amittentur jura, sed communicabuntur, sicut Sabinorum primo, deinde Albanorum jus in Romanos transfusum est, et una facta respublica, ut Livius loquitur. Idemque censendum de regnis, quæ non fœdere, aut eo duntaxat quod regem communem habeant, sed vera unitate junguntur.

Liv. i. 13. Lib. i. 28.

X. Contra evenit, ut quæ una civitas fuerat dividatur, aut consensu mutuo, aut vi bellica, sicut corpus imperii Persici divisum est in Alexandri successores. Quod cum fit, plura pro uno existunt summa imperia, cum suo jure in partes singulas. Si quid autem commune fuerit, id aut communiter est administrandum, aut pro ratis portionibus dividendum. Huc refe-

[3] In Decreto Amphictyonum, quale refert DIOD. SICULUS, Lib. XVI. cap. 61. nihil legitur de loco, quo Philippus sessurus esset; sed tantum illum duo habiturum suffragia, quemadmodum Phocenses habebant. *J. B.*

[q] *Uniantur duo populi*] Ut ex Celtis et Iberis facti Celtiberi, narrante Diodoro, (Lib. V. c. 33.) Vide, si vacat, de hoc argumento Reinkingium libro I. classe IV. c. 17. n. 95. et quæ ibi citata.

[r] *Ut pari jure sint*] Salva tamen reverentia matricibus debita, de qua egimus Lib. I. c. iii. § 21. Curtius, libro

now to be exercised by the body, but by the head. And hence we see what answer is to be made to a controversy which sometimes arises from circumstances; In what place in a convention ought he to sit who has acquired the sovereignty over a people free before: as in the Amphictyonic council, Philip of Macedon had the place which the Phoceans had had. And so on the other hand, the place which had belonged to the king, shall be filled by the people, made free.

IX. If at any time two Peoples are united, their rights will not be lost, but imparted by each to the other; as the rights, first of the Sabines, and afterwards of the Albans, were imparted to the Romans, and they were made one republic, as Livy speaks. The same is to be conceived of kingdoms which are united, not by league, nor only because they have a common king, but joined by a real union.

X. It may happen, on the contrary, that what had been one State is divided, either by mutual consent, or by war; as the body of the Persian empire was divided among the successors of Alexander. When this happens, there are several sovereignties in the place of one, each having its rights over the separate parts. If there was anything

renda et discessio, quæ ex consensu fit in colonias. Nam sic quoque novus populus sui juris nascitur: οὐ γὰρ ἐπὶ τῷ δοῦλοι, ἀλλ' ἐπὶ τῷ ὅμοιοι εἶναι ἐκπέμπονται, inquit Thucydi- Lib. i. 34.
des: *Non enim ut servi, sed* [v]*ut pari jure sint dimittuntur.* Idem secundam coloniam a Corinthiis Epidamnum deductam Cap. 27.
narrat ἐπὶ τῇ ἴσῃ καὶ ὁμοίᾳ, *ut pari jure esset.* Rex Tullus apud Dionysium Halicarnassensem: τὸ δὲ ἄρχειν ἐκ παντὸς Lib. iii. 11.
τῶν ἀποικιῶν τὰς μητροπόλεις ὡς ἀναγκαῖόν τι φύσεως νόμιμον, τοῦτο ἀληθὲς οὔτε δίκαιον ἠξιοῦτο ὑφ' ἡμῶν· *Ut omnino matrices urbes coloniis imperent, quasi naturæ lege, id vero nos neque verum neque æquum arbitramur.*

XI. 1 Nobilis est et illa quæstio apud historicos et jurisconsultos, de his quæ Romani imperii fuerunt cujus nunc sint: multi ea nunc esse volunt Germanici sive regni, ut olim vocabatur, sive imperii (utro autem nomine appelles ad rem non refert) et nescio quam surrogationem hujus imperii in illius locum sibi confingunt, cum tamen [4]notum satis sit Germaniam magnam, id est Transrhenanam, totam maxima temporis

IV. *Carthaginem Tyrii condiderunt, semper parentum loco culti.* (Cap. 2.)

[4] Hoc minime probat, *Imperatores Germaniæ* non successisse in locum *Impp. Romanorum:* quid enim obstat, quominus illi alio titulo simul sub ditione sua habuerint regiones, quæ extra complexum Imperii Romani fuerant? Vera ratio est, quam tamen Auctor non adgnoscit, jus Populi Romani dudum exstinctum, eo tempore quo Carolo Magno se subjecit. Sed de tota hac quæstione, quod satis est, diximus in Notis nostris Gallicis. Auctor heic passim ab

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which they had in common, that is either to be administered in common, or to be divided proportionally.

To this head also is to be referred the separation of a Colony from the mother-country. For in this case also there is produced a new people which is its own master: *They are sent out not to be slaves, but to have equal rights,* says Thucydides. And so he says that the second Colony was sent by the Corinthians to Epidamnus *to have fair and equal rights.* Tullus in Dionysius of Halicarnassus says, *That the mother-country should govern her colonies, as a necessary law of nature, we do not think either true or just.*

XI. 1 There is a very celebrated question among historians and jurists, To whom now belong the Rights which did belong to the Roman Empire?

Many hold that these rights belong to the German Kingdom, as it was formerly called, or the German Empire; (it makes no difference which name you adopt:) and they conceive that, in some way or other, one Empire was put in the place of the other. And yet it is well known that Great Germany, that is, Germany beyond the Rhine,

parte fuisse extra complexum Romani imperii. Mihi non præsumenda videtur mutatio aut translatio, nisi certis documentis probetur. Quare et populum Romanum eundem esse dico, qui olim fuit, quanquam extraneorum accessione admixtum, et imperium penes eum mansisse, tanquam penes corpus, in quo esset ac viveret. Nam quæ olim jure potuit facere populus Romanus, antequam Imperatores Romani regnarent, idem faciendi jus habuit, ut quisque Imperator mortuus erat, alio nondum existente. Imo et electio Imperatoris ad populum pertinebat, et aliquoties a populo [8]per se, aut per senatum facta est: quæ autem a legionibus modo his, modo illis fiebant electiones, non erant ratæ ex jure legionum (nam in vago nomine jus certum esse non poterat) sed ex approbatione populi.

Interpretibus et aliis Scriptoribus vapulat: quorum tamen nonnulli ut heic Gronovius, asperius eum exceperunt, suspicionibusque iniquis onerare conati sunt. *J. B.*

[8] *Per se, aut per Senatum*] Exempla passim electionum factarum a Senatu aut probatarum in Adriano, Pertinace, Juliano, Severo, Macrino, Maximo, Balbino, Aureliano, Tacito, Floriano, Probo, apud *Dionem, Spartianum, Capitolinum, Lampridium, Vopiscum.* Ante Aurelianum sex menses imperium fuit sine principe, ejusque electionem miles senatui detulit iterum atque iterum. Pro Senatus jure egregia Albini epistola apud *Capitolinum,* (cap. 13) et Senatus epistola pro Gordianis. (*Apud eumdem,* Maximin. c. 15.) Macrinus in oratione: *Detulerunt ad me imperium: cujus ego, Patres conscripti, interim tutelam recipio, tenebo regimen, si et vobis placuerit quod militibus placuit.* (Capitolin. in ejus vit. c. 6.) Tacitus Imperator apud Vopiscum in Probo (cap. 7.) *Me quidem senatus principem fecit, de prudenti exercitus voluntate.* Apud eundem Vopiscum Probus: *Recte atque ordine, Patres conscripti, proximo superiore anno factum, ut vestra clementia orbi terrarum principem daret, et quidem de vobis, qui et estis mundi principes, et*

was, for the greater part of the time, entirely without the circle of the Roman Empire. It appears to me that such a change or translation is not to be presumed, except it be proved by certain documents. I therefore hold that the Roman people is still the same people as formerly, before it received the admixture of strangers; and that the Roman Empire remained in it, as in the body in which it existed and lived. For what the Roman people had formerly a right to do, before the Emperors reigned, it had the right of doing the same, when one Emperor was dead, and another not yet created. And even the election of the Emperor belonged to the people; and was sometimes made by the people, by itself, or by the Senate. And the elections which were made by the Legions, sometimes by one and sometimes by another, were not valid by any rights which the Legions had; (for in so vague a name there could be no certain right;) but through the approbation of the people.

2 It does not make any objection to this view, that by a con-

2 Cum his non pugnat quod Antonini constitutione quotquot in orbe Romano sunt, cives Romani effecti sunt. Consecuti enim ea constitutione sunt subditi Romani imperii ea jura, quæ olim habebant coloniæ, et municipia, et provinciæ togatæ, ut et honorum participes essent, et jure Quiritium uterentur: non ut in aliis populis itidem ut in populo urbis Romæ [t] fons imperii esset: quod facere in potestate Imperatorum non fuit, qui habendi imperii modum ac causam mutare non potuerunt. Nec quod Imperatores postea Constantinopoli quam Romæ habitare maluerunt, de jure populi Romani quicquam imminuit: sed tunc quoque electionem factam a parte sui quæ Constantinopoli habitabat, unde Byzantinos Quirites vocat Claudianus, ratam populus totus habuit: jurisque sui monu-

semper fuistis, et in vestris posteris eritis. (Cap. II.) Majorianus ad senatum in novellis: *Imperatorem me factum, Patres conscripti, vestræ electionis arbitrio et fortissimi exercitus ordinatione agnoscite.* [IV. 3. *Supplem.* ad fin. Cod. THEODOS. *Ed. Gothofred.*]

[t] *Fons imperii esset*] Senatus pro Gordiano apud *Herodianum* provincias hortatur πείθεσθαι Ῥωμαίοις ὧν δημόσιον ἄνωθεν τὸ κράτος ἐστὶν, αὐτάτε φίλα καὶ ὑπήκοα ἐκ προγόνων· *Parere Romanis, quorum ab antiquo esset imperium, quibus veteri jure gentes aliæ amorem obsequiumque præstarent.* (Lib. VII. c. 7. *Ed. Bœcl.*) Apud eundem Maximus in allocutione ad milites: οὐ γὰρ ἑνὸς ἀνδρὸς ἴδιον κτῆμα ἡ ἀρχὴ, ἀλλὰ κοινὸν τοῦ Ῥωμαίων δήμου ἄνωθεν, καὶ ἐν ἐκείνῃ τῇ πόλει ἡ τῆς βασιλείας ἵδρυται τύχη.' ἡμεῖς δὲ διοικεῖν καὶ διέπειν τὰ τῆς ἀρχῆς μεθ' ὑμῶν ἐγκεχειρίσμεθα. *Non enim unius viri possessio est hoc imperium, sed antiquitus res est populi Romani: in hac urbe principatus fortuna sita est, nos vero vobiscum, milites, in id electi sumus, ut ea, quæ imperii sunt, curemus ac tueamur.* (Lib. VIII. c. 7.) Claudianus *de Roma:*

Armorum legumque parens quæ fudit in omnes
Imperium.

(*De Sec. Cons. Stilic.* vers. 136.)

stitution of Antonine, all the inhabitants of the Roman Empire were made Roman citizens. For by that constitution, the subjects of the Roman Empire obtained those rights which the Colonies formerly had, and the Municipalities (*Municipia*,) and the Togate Provinces, (*Provinciæ Togatæ;*) namely, that they should participate in the honours of the state, and use the Roman Law (*jus Quiritium;*) but not that the source of Empire should be in other peoples, as it was in the people of the city of Rome; which to do, was not in the power of the Emperors, because they could not change the manner and cause of holding the imperial authority*.

Nor did it detract any thing from the right of the Roman people,

* Grotius here sets up one fiction, that, under the Emperors, the right of election was in the people of Rome; and then another fiction, that this first fiction is not to be extended to persons not belonging to the city of Rome, though they had been made Roman citizens. We cannot wonder that he has found opponents in this view, as Gronovius in his Notes.

mentum non tenue servavit [u] in urbis suæ prærogativa, [x] et in honore consulatus aliisque rebus. Quare jus omne, quod hi, qui Constantinopoli habitabant, ad eligendum Imperatorem Romanum habere poterant, pendebat a voluntate populi Romani: et cum illi [y] contra mentem ac morem populi Romani [z] feminæ Irenes subiissent imperium, ut alias causas omittamus, merito populus Romanus illam concessionem sive expressam sive tacitam revocavit, et per se Imperatorem legit, ac voce primi civis, id est, episcopi sui (quomodo et in Judaica republica, rege non existente, prima erat summi Pontificis persona) pronuntiavit.

In Eutrop. ii. v. 135.

[u] *In urbis suæ prærogativa*] Ait Zonaras (in *Vit. Constantini*) Romæ servata πρεσβεῖα, prælationem, quod inde venisset imperium. (Lib. XIII. cap. 3.) Ammianus (Lib. XIV. c. 6) *de Roma: Per omnes tamen quotquot sunt partes ut domina conspicitur et regina.* Claudianus Honorio agente Ravennæ (*De* VI. *Cons. Honor.* vers. 407):

Quem, precor, ad finem laribus sejuncta potestas
Exsulat, imperiumque suis a finibus errat?

[x] *Et in honore consulatus*] Nam alter consulum ex urbe Romana, et is quidem priorem habebat locum. Procopius in arcana historia. [Cap. 26. ubi de præcedentia Consulis Romani ne γρὺ quidem.]

[y] *Contra mentem ac morem populi Romani*] Nero in XIV. annalium Taciti (cap. 11) matrem accusat: *Quod consortium imperii, juraturasque in feminæ verba prætorias cohortes, idemque dedecus senatus et populi speravisset.* Priscus in excerptis legationum: οὐ γὰρ θηλειῶν, ἀλλ' ἀῤῥένων ἡ τῆς Ῥωμαϊκῆς βασιλείας ἀρχή· *Non enim feminarum, sed marium est, Romani imperii principatus.* (Pag. 27.) Lampridius post mortem Heliogabali (cap. 18): *Cautum ante omnia, ne unquam mulier senatum ingrederetur, utque inferis ejus caput dicaretur devoveretur que per quem id esset factum.* Trebellius Pollio Herenniano: *Zenobia usurpato sibi imperio,*

that the Emperors chose to live at Constantinople rather than Rome. It must be supposed that the election was made by that part of the Roman people which lived at Constantinople (whence Claudian calls the Byzantines *Quirites*,) and confirmed by the whole people. And the Roman people preserved no small monument of its right, in the prerogatives of the city, in the honour of the consulship, and in other things. And therefore all the right that those who lived at Constantinople had to elect the Roman Emperor, depended on the will of the People of Rome. And when the Byzantines had, contrary to the desire and practice of the Roman people, elected a woman, Irene, to the empire, to omit other reasons, the Roman people revoked that concession, express or tacit, and elected an emperor itself; and declared its election by the voice of its First Citizen, that is, its Bishop*;

* Here we have a third fiction, that the election of the Byzantine Emperors was made by the Roman citizens at Byzantium, (though the Roman citizens in other cities had not such power of election, by the second fiction;) and a fourth fiction, that it was confirmed by the Roman citizens at Rome: which last fiction is slightly countenanced by the protest against Irene: and a fifth fiction, that

3 Fuit autem hæc electio personalis in Carolum Magnum, et quosdam ejus successores: [a] qui ipsi jus imperii quod habebant in Francos, ut et in Longobardos, a jure imperii in Romanos, ut nova ex causa quæsito, sollicite distinxerunt. [b] Postea vero diviso Francorum populo in occidentalem, qui Galliam nunc obtinet, et orientalem, qui Germaniam sive Alemaniam tenet (duo Francorum regna vocat Frisingensis) cum populus Francorum orientalis eligendo sibi reges facere cœpisset ([c] nam et ad id tempus Francorum regum successio quasi agnatica, non tam a jure certo, quam a populi suffragiis

diutius quam feminam decuit, rempublicam obtinuit. (In XXX. Tyrann. c. 27.)

[z] *Feminæ Irenes subiissent imperium*] Dicto etiam ei sacramento, quod habet Zonaras. [Sed vi extorto. Lib. XV. cap. 11.]

[a] *Qui ipsi jus imperii quod habebant in Francos, ut et in Longobardos, a jure imperii in Romanos, ut nova ex causa quæsito, sollicite distinxerunt*] Vide Synodum Pontigenensem inter capitula Caroli Calvi. Et Paulum Æmilium Lib. III. de Carolo Magno.

[b] *Postea diviso Francorum Populo in occidentalem, qui Galliam nunc obtinet, et orientalem, qui Germaniam*] Vide Witikindum libro I. et ibi notata Meibomii: et pactum Caroli et Henrici post capitula Caroli Calvi, et ad id notas viri magno judicio doctrinaque præditi Jacobi Sirmundi. Occidentalem illam Franciam Latinam Wibbo vocat, quod ibi sermo Romanensis vigeret, ut et nunc viget, cum Transrhenanæ nationes lingua Germanica uterentur.

[c] *Nam et ad id tempus Francorum regum successio quasi agnatica, non tam a jure certo, quam a populi suffragiis pependerat*] Observatum id Prisco in excerptis legationum, et Reginoni ad annum IↃ CCCXVI. Carolus Magnus in testamento: *Quod si filius quilibet horum trium filiorum.*

(as in the Judaic republic before the kings existed, the High-priest was the first person.)

3 This election was a personal election in the case of Charlemagne and some of his successors: who themselves carefully distinguished the right of authority which they had over the Franks and Lombards, from their right over the Romans, as obtained on new grounds. But afterwards, when the Frank people were divided into a western people, which now holds France, or Gallia, and an eastern, which holds Germany or Alemannia; and when the eastern Franks, (the Germans) had begun to elect kings, (for at that time the succession of Frankish kings was *quasi* agnatic, but depended more on popular suffrage than on certain right,) it was agreed by the people

the Pope, as the first citizen of Rome, declared the election made by the Roman People according to their ancient right; which is probably, as Gronovius says, not a view which would have pleased the Pope.

Grotius's scheme does however explain the relation of the Emperor of Germany, the kings of the Romans, and the Pope; and thus makes a jural transition from the ancient to the modern world. W.

pependerat) placuit populo Romano, quo certius præsidium haberet, regem non proprium sibi sumere, sed eum quem Germani fecissent: [d]ita tamen ut jus sibi aliquod retineret probandæ vel improbandæ electionis, quantum scilicet ea res ad se pertinebat.

4 Hæc quoque approbatio per episcopum edici et solemniter testata fieri peculiari coronatione solebat: quare ex electione septem principum, qui Germaniæ corpus referunt, qui lectus est, jus habet imperandi Germanis secundum eorum mores: ex approbatione vero populi Romani fit idem rex, aut Imperator Romanus, aut, ut historici sæpe loquuntur, [e]Rex regni Italiæ: atque eo titulo sub se habet quæcumque populi Romani fuerunt, neque pactionibus, aut derelicti occupatione, aut victoriæ jure in aliorum populorum imperium concesserunt:

[d] *Ita tamen ut jus sibi aliquod retineret probandæ vel improbandæ electionis*] Verissima res, et aperte testata Wibboni *vita Conradi Salici*.

[e] *Rex regni Italiæ*] Sic in excommunicatione Henrici distincte nominat Papa regnum Teutonicorum et Italiæ. Vide Ottonis privilegium Alderamo datum, editum a Meibomio post Witikindi *Saxonica*: et Cranzium *Saxonicorum* v. (cap. 13). In juramento Ottonis quod Gratianus intulit in Distinctionem LXIII. *In Roma nullum placitum sive ordinationem faciam de omnibus quæ ad te* (Papam) *aut Romanos pertinent, sine tuo consilio*. (c. 33.)

[f] *Investituras tribuat feudorum Imperii Romani*] Nempe ut in imperio

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of Rome, in order that they might be sure of a protector, not to have a king of their own, but the king whom the Germans had elected: yet so that they might retain some power of confirming or annulling the election, so far as they were concerned.

4 This approbation was wont to be proclaimed by the Bishop, and solemnly celebrated by a special coronation, [that of King of the Romans.] Wherefore he who is elected by the Seven Princes who represent Germany, has authority to rule over the Germans according to their usages. But the same person is, by the approbation of the Roman people, made Roman Emperor, or King, or, as historians often speak, King of the kingdom of Italy. And by that title, he has under him whatever belonged to the people of Rome, and that has not passed under the authority of other peoples by compact, or by occupation of derelict, or by the right of conquest.

And hence we easily understand by what right the Bishop of Rome, during the vacancy of the Empire, gives the investitures of the fiefs of the Roman Empire; namely, because he is the first person in the Roman people, which at that time is free. For whatever office belongs to any body, is wont to be discharged by the first person of that body, as we have elsewhere said.

unde illud quoque intelligi facile potest, quo jure episcopus Romanus, vacante imperio, [f]investituras tribuat feudorum imperii Romani, quia scilicet in populo Romano, tali tempore libero, primas obtinet. Solent autem quæ sunt corporis alicujus [g]per primam personam corporis nomine expediri, ut alibi quoque diximus. Neque vero male Cynus et Raynerius tradidere, si Imperator Romanus morbo aut captivitate impediretur fungi imperio, posse ei vicarium dari ab ipso populo Romano.

XII. Heredis personam, quoad dominii tam publici quam privati continuationem, pro eadem censeri cum defuncti persona, certi est juris.

XIII. Victor autem victo quatenus succedat, infra in effectibus belli explicabitur.

Germanico Palatinus et Saxo Vicarii imperii, divisis partibus. Vide Serranum Ludovico XII. (Pag. 505. *Ed. Paris.* 1627.)

g *Per primam personam corporis nomine expediri*] Nam et in Poloniæ interregno Archiepiscopus Gnesnensis Regis locum tenet, in solio regio sedet, tanquam primus inter Ordines. Philippus Honorius in dissertatione de regno Poloniæ. [Immo *De Interregno Poloniæ.* Et illa dissertatio est Horatii Spanorchii: quam Phil. Honorius tantum inseruit Thesauro Politico, a se collecto et edito, pag. 426, *et seqq. Edit. Francof.* 1617. *J. B.*]

Nor is that unsound which Cynus and Raynerius have laid down, that if the Roman Emperor were prevented from discharging his office by disease or captivity, there might be a substitute for him appointed by the Roman People.

XII. That the person of the heir, as to the continuation both of public and private ownership, is to be conceived as the same with the person deceased, is undoubted law.

XIII. How far the Conqueror succeeds to the Conquered, will be explained below in speaking of the effects of war.

CAPUT X.

DE OBLIGATIONE QUÆ EX DOMINIO ORITUR.

I. *Obligatio reddendæ domino rei alienæ unde et qualis. [Exstantia* [1] *restituere, et quantum in se est efficere ut reddantur.*

II. *Non exstantibus,] obligatio de reddendo eo quod quis lucrifecit ex alieno: quæ multis exemplis illustratur.*

III. *Bonæ fidei possessorem ad restitutionem non teneri, si res perierit.*

IV. *Eundem teneri ad restituendos fructus exstantes:*

V. *Et consumtos, nisi alias consumturus non fuerit:*

VI. *Non eos, quos neglexit percipere.*

VII. *Non teneri eundem ad restitutionem rei, quam donavit alii, cum distinctione:*

VIII. *Nec si rem emtam vendiderit, similiter cum distinctione.*

IX. *Quando pretium aut ejus partem servare possit, qui rem alienam bona fide emit.*

X. *Rem alienam emtam restitui venditori non posse.*

XI. *Qui rem habet, cujus ignoretur dominus, nemini teneri eam concedere.*

XII. *Ob causam turpem, aut alioqui debitam, acceptum non esse restituendum naturaliter.*

XIII. *Refellitur sententia statuens rerum, quæ pondere, numero, mensura constant, dominium sine consensu domini transire.*

I. 1 EXPLICATO, quantum instituto nostro sufficit, jure eo quod in personas aut res nobis competit, videndum etiam quæ exinde nascatur obligatio adversum nos. Nascitur autem hæc aut e rebus exstantibus (rerum nomine jam

[1] Uncinis heic a me inclusa, in nulla Editionum, quæ vivo Auctore prodierint, immo neque in primis post mortem ejus vulgatis, reperiuntur. *J. B.*

[a] *Tenetur is, qui rem nostram habet in sua potestate, efficere quantum in se est, ut in nostram potestatem veniat*] Inter præcepta jubentia legis Hebræis datæ est, ut res inventa restituatur domino. Præcepto jubente LXXIV. Fundamentum id habet tum in æquitate naturali, tum in Deuteronomii loco XXII. 1. Chrysostomus 1 *Corinth.* v. 8. Ταῦτα δὲ καὶ οἱ τῶν ἔξωθεν ἴσασι νόμοι,

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CHAPTER X. *Of the Obligation which arises from Ownership.*

I. 1 Having explained, as far as is requisite for our purpose, the Right which we may have over persons or things, we must now see what obligation upon us arises therefrom. Now such obligation arises either from things extant, (including in *things*, persons,) or from things not extant.

comprehendam etiam jus in personas, qua utile nobis esse potest) aut non exstantibus.

2 E rebus exstantibus obligatio hæc nascitur, qua [a] tenetur is, qui rem nostram habet in sua potestate, efficere quantum in se est, ut in nostram potestatem veniat. Quantum in se est, dico; neque enim obligatur ad impossibile, neque ad reddendam rem suis impensis: sed indicare tenetur, ut alter recipere suum possit. Nam sicut in rerum communium statu observanda erat æqualitas quædam, ut huic non minus quam alteri rebus communibus uti liceret; ita introducto dominio hæc [2] quasi societas inter dominos contracta est, ut qui rem

οἱ τοὺς ἁρπάσαντας καὶ ἀφελομένους ἀφέντες, ἐκείνους κελεύουσιν ἀπαιτεῖν, παρ' οἷς ἂν εὕροι τις τὰ αὐτοῦ κείμενα ἅπαντα. Hoc et sæculi probant leges quæ jus nobis faciunt, omisso raptore aut fure, eos compellare qui res nostras qualescunque eæ sint tenent. (Tom. III. pag. 338. *Ed. Savil.*) Hieronymus *ad Leviticum: Multi sine peccato putant esse, si alienum quod invenerint teneant, et dicunt: Deus mihi dedit. Cui habeo reddere? Discant, hoc peccatum simile esse rapinæ, si quis inventa non reddat.* [At locus ille non est Hieronymi, sed Origenis, ex Hom. IV. *in cap.* 6. *Levit.* unde versus est; ut in Editione Pithœana Corporis Juris Canonici observatum. *J. B.*] Augustinus Sermone XIX. *de Verbis Apostoli: Si quid invenisti et non reddidisti, rapuisti.* Deinde: *Qui alienum negat, si posset et tolleret.* Utrumque Gratianus retulit in causæ XIV. quæstionem V. Can. 6. et 8. Idem Augustinus *de Fide et Operibus* (cap. 7): *Sicut jure prædiorum tamdiu quisque bonæ fidei possessor rectissime dicitur, quamdiu se possidere ignorat alienum: cum vero scierit, nec ab alieno recesserit, tunc malæ fidei possessor perhibetur, tunc juste injustus possessor vocabitur.* Pertinet huc et lex Wisigothorum Lib. IX. tit. 1. c. 9. Interdum vero ob causas graves lex civilis intendit augetque hanc obligationem, ut in servo fugitivo lex Burgundica lib. I. tit. VI. Bona quæ dominis per injuriam ademerat Domitianus, Nerva restitui jussit. Habet id Xiphilinus (pag. 240 c. *Ed. H. Steph.*) Apud Procopium *Gotthicorum* II. *Belisarius: οἶμαι δ' ἔγωγε τόν τε βιασάμενον, καὶ ὃς ἂν τὰ τοῦ πέλας ἑκουσίως μὴ ἀποδιδῷ, τὸν αὐτὸν ἑκών γε εἶναι. Mihi ita libet credere, pari loco esse res alienas sponte retinentem, et non reddentem, cum raptore.* (Cap. 6.)

[2] Nullam societatem, nullum pactum, heic intelligere necesse est. Vide quæ hac de re, simul et de toto argumento istius Capitis, diximus in notis ad Pufendorfium, *De Jure Nat. et Gent.* Lib. IV. cap. xiii. alterius Editionis, ubi omnia accuratius exsequuti sumus, quam in prima Editione, et, ut putamus, quam ab ullo adhuc factum fuerat. *J. B.*

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2 From things extant, this obligation arises; that he who has a thing of mine in his power is bound to do so as much as he can that it may come into my power. I say, as much as he can: for he is not obliged to what is impossible, nor to restore the thing to me at his own expense; but he is bound to indicate it, that another may recover what is his. For as in the state of community of things, a certain equality came to be observed, so that one might be able to use those

alienam in sua haberet potestate, eam domino redderet. Nam si dominii ea tantum fuisset vis ut poscenti domino reddenda res esset, nimis debile futurum fuisset dominium, et nimis sumtuosa custodia.

3 Neque hic consideratur bona quis an mala fide rei possessionem nactus sit: alia enim obligatio est ex delicto, alia ex re. Lacedæmonii delicto se liberaverant, damnato Phœbida, qui Cadmeam Thebanorum arcem contra fœdus ceperat, sed ipsi [b]injustitiæ accusati quod arcem nihilominus retinerent. Eamque injustitiam, ut singularem, etiam singulari Dei providentia vindicatam notavit Xenophon. Sic M. Crassum et Q. Hortensium reprehendit Cicero, quod hereditatis partem retinuissent ex testamento, quod falsum, sed sine eorum culpa, confectum erat.

Diod. xv. 20. Plut. *Pelop.* p. 280.

Hist. Græc. v. 4.

De Offic. iii. 18.

4 Quia vero hæc obligatio tanquam ex contractu universali omnes homines tenet, et jus quoddam rei domino parit, eo fit ut singulares contractus, quippe tempore posteriores, exceptionem inde accipiant. Inde lucem accipit illud Tryphonini:

L. Bon. Fid. 31. *D. Depos.* § 1.

[b] *Injustitiæ accusati*] Ita judicat Diodorus libro xv. (c. 20). Plutarchus *Agesilao : τὴν πόλιν ἔπεισεν εἰς αὐτὴν δέξασθαι τὸ ἀδίκημα, καὶ κατέχειν τὴν*

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common things not less than another; so when ownership is introduced, there is a sort of association established among owners, that he who has in his power a thing belonging to another, is to restore it to the owner. For if ownership were only so far effective, that the thing is to be restored to the owner if he asks for it, ownership would be too feeble, and custody too expensive.

3 Nor is it here considered whether a person has obtained possession of the thing *bona fide* or *mala fide*, believing that he has a right, or not: for the obligation from delict (*mala fides*) is one matter, but the thing (and possession of it) is another. The Lacedæmonians tried to free themselves from the delict by condemning Phœbidas who had seized Cadmea, the citadel of the Thebans, in violation of the treaty; but as they, nevertheless, retained the citadel, they were charged with injustice: and this injustice, as being flagrant, was avenged by a singular providence of God, as Xenophon notes. So Cicero blames M. Crassus and Q. Hortensius who had kept possession of legacies by a will which was false, though fabricated without fault of theirs.

4 But because this obligation binds all men, as by a universal contract, and gives a certain right to the owner: hence it comes that special contracts, as later in time, are subject to exception. Hence light is thrown on the case put by Tryphoninus. *A robber took my*

Latro spolia quæ mihi abstulit, posuit apud Seium inscium de malitia deponentis: utrum latroni, an mihi restituere Seius debeat? Si per se dantem, accipientemque, intuemur, hæc est bona fides, ut commissam rem recipiat is qui dedit: Si totius rei æquitatem, quæ ex omnibus personis, quæ negotio isto continguntur, impletur, mihi reddenda sunt, quoi (male legitur *quo*) *facto scelestissimo ademta sunt.* Recte autem addit: *Et probo hanc esse justitiam, quæ suum cuique ita tribuit, ut non distrahatur ab ullius personæ justiore repetitione.* Justior nimirum est repetitio domini ex jure illo, quod ipsi dominio æquævum diximus: unde etiam illud sequitur quod apud eundem Tryphoninum est, ut qui rem suam ignorans depositam accepit, reddere eam non teneatur: et quod ibidem paulo ante quærebatur de bonis depositis ab eo, cujus bona erant publicata, hinc potius quam ex eo quod de pœnarum utilitate adfert Tryphoninus, definiendum est.

5 Nam ad dominii naturam nihil refert, ex gentium, an ex civili jure oriatur: semper enim secum habet quæ sibi

καδμείαν δι' ἑαυτῆς. *Civitati persuasit ut in se culpam transferret, retinendo sibi arcem Cadmeam.* (Pag. 609 B.) Simile facinus Bajazetis in Nicopoli apud Leunclavium lib. VI.

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property and deposited it in the hands of Seius, who was ignorant of the crime: ought Seius to restore it to the robber or to me? If we look only at the giver and receiver, bona fides *requires that the thing deposited should be restored to him who gave it. If we look at the equity of the whole matter, taking into account all the persons concerned, the property must be restored to me, from whom it was most wrongfully taken.* And he rightly adds: *I am of opinion that justice requires to give to each man his own in such a way, that it be not again to be transferred by the more just demand of another person.* In fact, the claim of the owner is more just, in virtue of that right which we have spoken of as contemporary with ownership. And hence it follows, as we find in the same Tryphoninus, that he who in ignorance has received, as a deposit, a thing which is his own, is not bound to restore it: and the question discussed a little before, concerning things deposited by him whose property had been forfeited, is to be decided on these grounds, rather than by the consideration which Tryphoninus adduces, of the utility of the punishment.

5 It makes no difference in the nature of ownership whether it arise *jure gentium* or *jure civili:* for it always has along with it the accompaniments which are natural to it: among which is the obligation of every possessor to restore a thing to its owner. And this is

sunt naturalia, inter quæ est obligatio cujusvis possessoris ad rem domino restituendam. Et hoc est quod ait Martianus, jure gentium condici posse res ab his, qui non ex justa causa possident.

L. 25. D. de Act. Rer. Amot.

Ex hoc fonte oritur illud quod ab Ulpiano est proditum, qui rem alienam invenit, eum ita ad eam domino reddendam teneri ut εὕρετρον, hoc est, præmium inventionis petere non possit. Reddendi autem sunt et fructus salvis impensis.

L. 43. § 9. D. de Furt.

II. 1 De rebus non exstantibus hoc humano generi placuit, ut si tu ex re mea factus es locupletior, me rem non habente in tantum, tenearis in quantum es factus locupletior: quia quatenus ex meo lucratus es, plus habes, cum ego minus habeam: introducta autem sunt dominia ad servandam æqualitatem, in eo scilicet, ut quisque suum haberet. [c] *Contra naturam esse*, ait Tullius, *ex hominis incommodo suum augere commodum.* Et alibi: *Illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus.*

Cajet. ad Th. 2. 2. 62. art. 6. L. 20. § 6. D. de Pet. Hered.

De Offic. iii. 5. Vid. L. 206. D. de Reg. Jur. et ibi Interp. Immo ibid.

2 Est hujus dicti tanta æquitas, ut multa hinc definiant jurisconsulti extra legum præscripta, semper ad ipsam æqui-

c *Contra naturam esse ex hominis incommodo suum augere commodum*] Cassiodorus x. 16. *Hoc nostris temporibus confitemur inimicum, ut alter alterius lætetur incommodo.*

what Martinus says, that, *jure gentium*, things may be sued for from him who possesses them without just cause.

From this source arises that which is delivered by Ulpian, that he who finds anything is so far bound to restore it to the owner, that he cannot demand a reward for finding it. Also the produce of the thing found is to be restored, saving the expense.

II. 1 Concerning things not extant, this is the rule established by mankind (the *jus gentium*), that if you are made richer by something which is mine, and which I am deprived of, you are bound to make restitution to the extent of your gain. For by what you have gained from my property, you have so much the more, and I the less. But ownership was introduced to preserve equality, that is, each having his own. So Cicero. [See.]

2 This rule of equity extends so far that the jurists define many points by means of it, without applying rules of law, referring to equity as the plainest ground. Thus a person is held responsible for the acts of a servant whom he has set over a shop, except he have warned people against trusting him. And even when he has given warning, if the servant have only a share in the business, and if the surplus

tatem, ut evidentissimam, provocantes. Ex actu servi institoris tenetur qui præposuit, ita nisi denunciaverit ne ei crederetur: At etiam si sit facta denunciatio, et servus ex eo contractu peculium habeat, aut in rem domini versum sit, replicabitur de dolo. *Videtur enim*, inquit Proculus, *dolum malum facere, qui ex aliena jactura lucrum quærat.* Ubi doli mali vox id omne significat, quod naturali juri et æquitati repugnat. *L. Si quis Mancip. 17. D. de Inst. Act. § 4.*

Qui matre jubente pro filii defensore fidejussit, adversus defensorem mandati actionem non habet, nec proprie ejus gessit negotium, quia contemplatione matris fidejussit: Attamen ex Papiniani sententia dabitur actio negotiorum gestorum (utilis, ni fallor) in defensorem, quia pecunia fidejussoris liberatur. *L. Quam. 6. ad SC. Vell.*

Sic uxori quæ marito pecuniam donavit, quam ex lege posset repetere, datur condictitia aut utilis vindicatio in rem ex pecunia comparatam; quia, inquit Ulpianus, locupletiorem esse maritum negari non potest: et hoc quæritur, quid ex re mulieris possideat. *L. Ux. Mar. 55. D. de Don. int. Vir. et Uxor.*

Si consumseris nummos quos mihi meus servus surripuerat, peculiares putans, condictio eo nomine mihi adversus te competit, quasi res mea ad te sine causa pervenerit. *L. 30. pr. ver. Secund. D. de Act. Emt.*

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of profit go to the master, his warning is not held good. *For*, says Proculus, *he appears to act fraudulently* (dolo malo) *who tries to get gain by the loss of others* (the servant's creditors); where *dolus malus* means anything contrary to natural right and equity.

If a friend, at the request of the mother, have advanced money for the son's agent, he has not properly an action against the agent, for commission discharged or work done; nor was it properly the agent's work which he did; for it was in regard to the mother that he gave his money; yet, according to Papinian, there will lie an (indirect) action for work done, against the agent, because he has been liberated from responsibility by the money of the friend.

If a wife have given money to her husband, which she could by law call back again, she has an action establishing her claim to that which has been bought with the money: for, says Ulpian, it cannot be denied that the husband is the richer by the proceeding: and there is to be an inquiry what he possesses which is his wife's.

If money, which my servant stole from me, you have spent, thinking that it was his own property, I have an action against you, as if my property had come into your hands without any just title to it.

L. 3. D. Commod. Pupilli non tenentur commodati secundum leges Romanas; tamen utilis actio dabitur, si pupillus locupletior factus sit.

L. Rescript. 12. § 1. de Dist. Pignor. Sic si aliena res pignori data, et a creditore vendita fuerit, quantum ad creditorem, pro pretii accepti quantitate, liberatur debitor: quia, inquit Tryphoninus, ex quali quali obligatione, occasione debitoris redactum pretium æquius debitori proficiet, quam creditoris lucro cederet: sed emtori debitor tenebitur, ne ex aliena jactura lucrum sibi quærat: nam et si majores fructus a possessore creditor abstulisset, universos in quantitatem acceptos ferre deberet.

L. Si me et Tit. 32. D. de Reb. Cred. Similiter si cum debitore meo, non tanquam meo, sed alienum debitorem putans egisti, et mutuam ab eo accepisti pecuniam, obligaris, non quia pecuniam tibi credidi, (hoc enim nisi inter consentientes fieri non potest) sed quia pecunia mea, quæ ad te pervenit, eam mihi a te reddi bonum et æquum est.

3 Posteriores quoque juris interpretes ad facta similia *Acc. in d. l. Rescript.* hæc recte producunt: nempe ut cujus latitantis bona venum

[3] Non tenetur: quoniam, ut puto, ille, quamdiu fuit bonæ fidei Possessor, secundum Legem Naturalem eadem plane jura habuit, ac si verus Dominus fuisset. Id probavimus ad Caput Pufendorfii jam indicatum: ubi videre poterit Lector, quomodo in plerisque casuum sequentium alias regulas tra-

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Wards are not bound to repay loans according to the Roman Law; yet, if the ward thereby become richer, an indirect action will lie.

If a debtor pledge a thing belonging to another, and it be sold by the creditor, the debtor is relieved, in respect to the creditor, to the extent of the price received for the thing: because, says Tryphoninus, whatever be the kind of obligation which the debtor has, the price paid in consequence of the debtor's proceeding, may more equitably go to the debtor's profit, than to that of the creditor. But the debtor will be bound to the buyer, because he is not to gain by another's loss. If the creditor had taken a greater part of the produce than would pay him, he would have to account for the whole which he had received.

In like manner, if you dealt with my debtor, not as thinking him indebted to me, but to another person, and borrowed money of him, you are bound to me; not because I have entrusted money to you; (for this cannot be done without mutual consent;) but because my money, which has made its way to you, it is fair and equitable that you should render to me.

3 The later jurists extend these principles to other similar cases: for instance, that if a person have absconded and his goods have been

ierant, cum exceptionem haberet, is ad pecuniam ex bonis suis redactam admittatur; et ut qui pecuniam patri credidit ad alendum filium, si pater solvendo non sit, in ipsum filium bona materna habentem actionem habeat. Jason. *in d. l. si me et Tit.*

His regulis duabus recte intellectis, non difficilis erit responsio ad eas quæstiones quæ et a Jurisconsultis, et a Theologis internum animi tribunal instruentibus, proponi solent. Soto, l. iv. q. 7. art. 2. Covar. *ad c. Pecc.* par. 11. § 1. Silv. *in Verb. Restit.* n. 3. q. 6. Medina *de Contr.* q. 10. Less. ii. 14. Navar. 17. n. 7

III. Primum enim apparet, bonæ fidei possessorem (nam malæ fidei possessor, ultra rei rationem, ex facto suo tenetur) non teneri ad ullam restitutionem si res perierit: quia nec res ipsa apud eum est, nec lucrum ex re.

IV. Secundo, bonæ fidei possessorem teneri ad restituendos [3] etiam fructus exstantes rei: dico fructus rei; nam industriæ fructus etiam si sine re non procederent, rei tamen non debentur. Causa hujus obligationis est ex dominio: nam qui dominus est rei, idem naturaliter dominus est fructuum rei.

V. Tertio, bonæ fidei possessorem teneri ad restitutionem

damus, e principio simplicissimo et facillimo fluentes; quum definitiones Auctoris nostri satis inter se non consentiant, et difficultatibus plurimis obnoxiæ sint. *J. B.*

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sold, when he had a case which would have protected them, he is to be admitted to the money raised by the sale: and he who has lent money to support the son, if the father be insolvent, and the son have maternal property, has an action against the son.

These two rules being rightly understood (for extant and non-extant property), the answer will not be difficult to the questions which are wont to be proposed by Jurists and by Theologians, writing for the instruction of the internal tribunal of the mind.

III. In the first place, it appears that a *bona fide* possessor is not bound to any restitution, if the thing be destroyed; for he neither has the thing nor any gain from the thing: [a *mala fide* possessor is bound by his own act, besides the consequences of wrong doing.]

IV. Secondly, a *bona fide* possessor is bound to restore also the still extant produce of the thing: I say the produce of the *thing;* for the produce of industry, even if it would not take place without the thing, is not due to the thing. The cause of this obligation is ownership: for he who is owner of a thing is naturally owner of the fruits of the thing.

V. Thirdly, that a *bona fide* possessor is bound to restitution both of the thing and of the produce of it consumed by him, if in any case he would have consumed as much: for by so much he is

et rei, et fructuum consumtorum, si modo alias quoque tantundem consumturus fuerat: nam in hoc locupletior censetur.
Suet. 16. Sic laudatur circa initia imperii C. Cæsar Caligula, quod quibus regna restituit, adjecit et fructus medii temporis.

VI. Quarto, non teneri eum ad restituendos fructus quos percipere neglexit: quia nec rem habet, nec quicquam quod rei loco succedit.

VII. Quinto, si talis possessor rem sibi donatam alii donaverit, non teneri eum nisi omnino etiam sine hac re donaturus tantundem fuisset: tunc enim lucrum erit rei suæ pepercisse.

Vid. L. 48. § ult. D. de Furt. L. 22. D. de Pet. Her. L. 25. eod. L. 23. D. de Reb. Cred.

VIII. Sexto, si rem emtam vendiderit, non teneri, nisi quatenus forte pluris vendiderit: quod si donatum vendiderit, teneri ad restituendum pretium, nisi forte prodegerit pretium, alias non prodacturus.

L. 3. 23. C. de Rei Vind. L. 16. C. de Evict.

IX. 1 Septimo, rem alienam bona fide emtam restituendam, nec posse erogatum pretium repeti: cui regulæ hæc

d *Nisi quatenus dominus rei suæ possessionem recipere sine impendio aliquo probabiliter non potuit*] Apud Terentium *Heautontimorumeno* Act. IV. Scena IV. (vers. 42. *et seqq.*)

Sed illud quod tibi
Dixi de argento quod ista debet Bacchidi;
Id nunc reddendum est illi: neque tu scilicet
Eo nunc confugies; quid mea? num mihi datum est?
Num jussi? num illa oppignerare filiam
Meam me invito potuit? verum illud, Chreme,
Dicunt: jus summum sæpe summa est malitia.

Ubi et Eugrafium vide. Hæc æquitas

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held to be richer. And accordingly Caligula is praised for having, in the beginning of his reign, when he restored governments to persons, given them also the income of the interval elapsed.

VI. Fourthly, a *bona fide* possessor is not bound to restore the produce which he neglected to take; for he neither has the thing, nor anything which has come into its place.

VII. Fifthly, if a *bona fide* possessor has given to another a thing given to himself, he is not bound to restitution, except, in any case, without having this thing, he would have given something of equal value: for then he has gained by sparing his own property.

VIII. Sixthly, if he sell a thing which he have bought (belonging to another), he is not bound*, except in so far as he sold it for more than he gave for it. If he have sold a thing given to him (belonging to another) he is held to restore the price; except it happen that he have spent the price, and would not otherwise have spent the money.

* These two Rules do not agree well together: according to the seventh, a thing belonging to another, which we have bought *bona fide*, we must restore to the owner, not requiring the price from him; according to the sixth, if we have bought it, and then sold it, we are not bound to restore the price. It appears to be assumed, in the seventh Rule, that we have a remedy against the seller. W.

addenda mihi videtur exceptio, [d]nisi quatenus dominus rei suæ possessionem recipere sine impendio aliquo probabiliter non potuit, ut puta si res apud piratas fuerit. Tunc enim deduci poterit quantum dominus impensurus libenter fuerat: ipsa enim facti possessio, præsertim recuperatu difficilis, est aliquid æstimabile, et in hoc dominus post rem amissam censetur factus locupletior. Et ideo cum rei suæ emtio ordinario jure non valeat, valere tamen eam ait Paulus Jurisconsultus, si ab initio id convenit, ut possessio quæ apud alterum est ematur. Neque hic requiro ut emta res sit [e]cum animo ut domino restitueretur, quo casu negotiorum actionem nasci, sunt qui aiant, sunt qui negent. Nam negotiorum gestorum actio ex lege civili nascitur: nullum enim habet eorum fundamentorum, ex quibus natura obligationem inducit. Nos autem id quod naturale est hic quærimus.

L. Suæ, 16. D. de Cont. Emt. L. Si in Emt. 34. § Rei. 4. D. de Contr. Emt. L. Si Labor. 2. § Si Nav. 3. ad Leg. Rhod. Vid. Ægid. Reg. Disp. 31. dub. 7. num. 126. Host. Tit. de Pæn. v. quid de Præd. Ement. Bal. et Cast. l. 1. D. de Neg. Gest. L. et si quis, 14. § idem Lab. 13. D. Relig. et s. f. Bals. ad can. x. Greg. Thaum.

2 Non dissimile est quod de funeraria scripsit Ulpianus, justum judicem in ea non meram negotiorum gestorum actio-

etiam ab Hebræorum magistris probatur, et a Wisigotthis libro IX. tit. i. c. 9. et c. 14. Alc. III. Præs. 29. Menoch. V. Præs. 29. num. 26. Stracham parte 11, num. 18.

[e] *Cum animo ut domino restitueretur*] *Speculum Saxonicum* 11, 37. Landrecht tit. XV.

IX. 1 Seventhly, a thing belonging to another which has been *bona fide* bought, is to be restored, and the price paid cannot be demanded back*. To which rule it seems to me that this exception should be made;—except in so far as the owner could not probably recover possession of his thing without some expense; as, for example, if it were in the hands of pirates: for then we may deduct as much as the owner would willingly have expended on it. For the actual possession of a thing, especially of a thing difficult to recover, is of itself a valuable matter, and in this the owner, after he has lost the thing [and recovered it] is richer than he was before. And therefore though the buying of a thing which is one's own is not valid by ordinary law, yet Paulus says that it is valid, if it be agreed from the first that the possession which another has of it may be bought. Nor do I here require that the thing should be bought with a purpose of restoring it to the owner, in which case an action for agency would lie. Some hold one way, some the other. For the action for agency is the creation of the Civil Law, and has none of those foundations by means of which nature induces obligation. And we are here inquiring what is Natural Law.

2 Ulpian's opinion respecting funeral expenses is of the same kind; that a just judge in such cases does not merely imitate the effect of an action for agency, but follows equity in a larger manner, the

nem imitari, sed solutius æquitatem sequi, cum hoc ei actionis natura indulgeat. Et quod alibi idem ait, si quis negotia mea gesserit, non mei contemplatione, sed sui lucri causa, et circa res meas aliquid impenderit, non quidem in id quod dedit, sed in id quod ego locupletior sum, habiturum actionem. Sic [4]enim et domini rerum, quarum jactu levata est navis, partem recuperant ab aliis, quorum res jactu servatæ sunt: quia et qui rem alioqui perituram servavit, in hoc videtur locupletior.

L. Si Pupil. 6. § *sed si quis.* 3. *D. de Neg. Gest.* Cajet. 2. 2. 62. 6. Soto, l. 4. q. 7. art. 2. Covar. *d. loco.*

L. 1. *D. ad l. Rhod.*

X. Octavo, eum, qui rem alienam emit, non posse eam restituere venditori ut pretium servet, quia ex quo res in ejus fuit potestate, jam, ut diximus, cœpit obligatio restituendi.

XI. Nono, eum qui rem habeat, cujus dominus ignoratur, non teneri naturaliter eam rem pauperibus dare: [f]quanquam valde hoc pium sit, et recte multis in locis constitutum. Ratio est, quia ex dominio nemo jus habet præter dominum. Non esse autem, et non apparere, tantundem valent quoad eum cui non apparet.

[4] Heic *enim*, in omnibus Editionibus, positum pro *etiam*, errato, ut mihi videtur, typographico, quem tamen Auctor non animadvertit. Certe est id novum exemplum, non ratio jam dictorum. *J. B.*

[f] *Quanquam valde hoc pium sit*] Chrysostomus indicato jam loco. (*In* 1 *Co-*

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nature of the action allowing him to do so. And what the same writer elsewhere says, if any one has transacted business for me, not having a regard to me, but for the sake of his own gain, he may have an action, not for all that he has expended, but for the amount by which I am richer. And so the owners of goods which are thrown overboard to lighten the ship, recover a part from the others whose goods are saved by that proceeding; for a person who preserves, by any step, his property which was in danger of perishing, is by so much the richer.

X. Eighthly; the person who has bought a thing belonging to another, cannot restore it to the seller to save himself the price: because, as soon as the thing is in his possession, the obligation of restoring it has begun.

XI. Ninthly; he who has a thing the owner of which is unknown, is not naturally bound to give it to the poor: although this is a very pious course, in many places properly ordered. The reason is, because, in virtue of ownership, no one has a right except the owner. But that there is no owner, and no apparent owner, is the same thing to him to whom he is not apparent.

XII. Tenthly, by Natural Law, what is received either for a shameful cause, or for an honest cause to which any one was bound, [without reward] is not to be restored: though such a rule is not un-

XII. Decimo, naturaliter quod ob causam turpem aut honestam, ad quam quis obligabatur, acceptum est, non esse restituendum, quanquam hoc quoque non immerito legibus quibusdam introductum est. Ratio est, quia ratione rei nemo tenetur, nisi res sit aliena; hic autem dominium transit ex prioris domini voluntate. [g] Aliud erit si in ipso accipiendi modo vitium fuerit, puta extorsio: hoc enim est aliud obligationis principium, de quo hic non agimus.

Thom. 2. 2. 62. art. 5. *Resp. ad* 2. *et* Cajet. *ibid.* Covar. p. 2. § 2. *ad cap. Pecc.* 1 *Sam.* xii. 5, 6.

XIII. Addamus et hoc mendose a Medina traditum, rerum alienarum in nos dominium transire sine consensu domini, si res sint tales, quæ pondere, numero, et mensura æstimari soleant. Nam res ejus generis functionem quidem recipere dicuntur, id est, restitui posse per id quod genere idem est, sed ita demum si consensus præcesserit, aut ex lege aut more præcessisse intelligatur, ut in mutuo; aut etiam si res, utpote consumta, exhiberi nequeat. At extra talem consensum, vel expressum, vel præsumtum, et extra necessitatem functio ista locum non habet.

De Rest. q. 10.

L. Rogast. 2. § *ult. D. de Reb. Cred. et si Cert.*

rinth. v. 8.)

g *Aliud erit si in ipso accipiendi modo vitium fuerit, puta extorsio*] Optime hæc distinguit Augustinus epistola LIV. (quæ est CLIII. novæ *Edit. Benedictin.*)

reasonably introduced by some laws. The reason is, that no one is bound by the reason for which the thing is given, except it be a thing belonging to another: but in the case now supposed, the ownership passes in virtue of the will of the former owner. It is another matter if there be something wrong in the mode of acquisition; for instance, extortion: for this is another principle of obligation, concerning which we do not now speak.

XIII. Let us add also this, erroneously ruled by Medina: that the ownership of things belonging to others may pass to us without the consent of the owner, if they are such things as are commonly valued according to number, weight, and measure. Things of this kind are said *functionem recipere*, to be such that our portion may pass for another, so that they may be restored by means of that which is not identical, but only the same in kind. But this can be done only when consent has preceded, or may, by law or usage, be understood to have preceded, as in lending; or if the thing, being consumed, cannot be exhibited. But without such consent, express or presumed, and without necessity, that *function* has no place.

CAPUT XI.

DE PROMISSIS.

I. *Refellitur sententia statuens ex promissis jus naturaliter non oriri.*

II. *Assertionem nudam non obligare.*

III. *Pollicitationem naturaliter obligare, sed inde alteri jus non nasci.*

IV. *Quid sit promissum unde alteri jus oritur.*

V. *Requiri ad hoc in promittente usum rationis: ubi distinguitur jus naturale a legibus civilibus circa minores.*

VI. *Promissio errantis an et quatenus obliget naturaliter.*

VII. *Promissionem ex metu obligare, sed qui metus causam dedit, teneri ad liberandum promissorem.*

VIII. *Id quod promittitur, ut promissio valeat, oportere in potestate sit promittentis.*

IX. *An promissio ob causam vitiosam valeat naturaliter, per distinctionem explicatur.*

X. *Quid sentiendum de promissione facta ad consequendam rem jam ante debitam.*

XI. *Modus valide promittendi per nos ipsos.*

XII. *Modus valide promittendi per alios; ubi et de legatis mandata excedentibus.*

XIII. *Exercitoria et institoria obligationes quatenus ex jure naturæ procedant, ubi et juris Romani error notatur.*

XIV. *Ad promissionis validitatem acceptationem requiri.*

XV. *An acceptatio innotescere debeat promissori, per distinctionem explicatur.*

XVI. *Revocari promissionem posse, mortuo ante acceptationem cui promissum erat.*

XVII. *An et internuntio mortuo, per distinctiones explicatur.*

XVIII. *An revocabilis sit promissio, acceptione per alterum facta, per distinctiones explicatur.*

XIX. *Onus promisso adjici quo tempore possit.*

XX. *Quomodo convalescere possit invalida promissio.*

XXI. *Promissiones sine causa naturaliter non esse irritas.*

XXII. *Qui factum alienum promisit ad quid naturaliter teneatur.*

I. 1 PERDUXIT nos ordo ad obligationem quæ ex promissis oritur: ubi statim se nobis objicit vir erudi-
Lib. i. 6; v. 1. tionis minime vulgaris Franciscus Connanus. Is enim hanc

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Chapter XI. *Of Promises.*

I. 1 The order of our work has led us to the obligation which arises from promises. And here we at once find opposed to us a man

defendit [1]sententiam, jure naturæ ac gentium ea pacta, quæ non habent συνάλλαγμα, nullam inducere obligationem: honeste tamen impleri, si modo talis res sit, quam præstare etiam citra promissum honestum ac virtuti alicui congruens fuerat.

2 Adfert autem pro sententia sua non tantum Jurisconsultorum dicta, sed et rationes has: quod non minor sit culpa ejus qui temere nulla de causa pollicenti credit, quam ejus I.
qui vanitatem adhibuit promissionis: deinde quod fortunis II.
omnium magnum immineat periculum, si promisso, quod sæpe ex ostentatione magis quam ex voluntate proficiscitur, aut ex voluntate quidem, sed levi ac parum considerata, tenerentur homines: postremo, quod justum fuit aliqua honestati cujus- III.
que relinquere, nec ad necessitatem obligationis exigere: turpe esse promissa non implere, non quod injuste id fiat, sed quod detegatur promissionis levitas.

Tullii quoque utitur testimonio, qui dixerit, nec promissa *De Offic.* i. 10.
servanda, quæ sint iis quibus promiseris inutilia, nec si plus tibi noceant, quam illi prosint cui promiseris.

Quod si res integra non sit, vult deberi non quod pro-

[1] Confer PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. III. cap. 5. § 9. *et seqq.* *J. B.*

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of no ordinary erudition, Francis Connanus. For he maintains this opinion, that, *jure naturæ ac gentium*, those pacts which have not a consideration (συνάλλαγμα), do not induce any obligation; though no doubt they may be properly fulfilled, if the matter be such as it would have been, without promise, proper and congruent to some virtue to perform.

2 He adduces for his opinion not only the *dicta* of jurists, but also these reasons: (1) That there is a fault no less in him who rashly trusts a person who makes a promise for no cause: (2) That there is a great danger thrown upon the fortunes of all, if men be judged to be bound by a promise, which often proceeds more from ostentation than from real purpose; or from a purpose, but a light and inconsiderate one: (3) That it is right to leave something to each person's honesty, and not to bind men to the necessity of an obligation:—that it is disgraceful not to fulfil promises, not because such a course is unjust, but because thereby the levity of the promise is detected.

He also uses the authority of Cicero, who says, that promises are not to be kept when they are useless to those to whom they are made; nor if they do more harm to you than good to those to whom you made them. (*De Off.* i. 10.)

If the matter be no longer open, in consequence of some step

missum est, sed quod interest: ceterum pacta, quam ex se non habent vim, eam accipere aut ex contractibus, quibus insunt aut adjiciuntur, aut ex rei traditione: unde nasci partim actiones, partim exceptiones, et vetitam repetitionem.

Quæ vero pacta vim obligandi secundum leges habeant, ut pacta stipulata, et alia quædam, habere eam legum beneficio, quarum ea est efficacia, ut quod per se honestum est, id efficere possint etiam necessarium.

3 Verum hæc sententia, ita generaliter ut ab ipso effertur accepta, consistere non potest. Primum enim sequitur inde inter reges et populos diversos, pactorum, quamdiu nihil ex iis præstitum est, vim esse nullam, præsertim iis in locis, ubi nulla certa forma fœderum aut sponsionum reperta est. Tum vero ratio nulla reperiri potest, cur leges, quæ quasi pactum commune sunt populi, atque hoc nomine vocantur ab Aristotele et Demosthene, obligationem pactis possint addere; voluntas autem cujusque, hoc omni modo agentis ut se obliget, idem non possit, præcipue ubi lex civilis impedimentum non affert. Adde quod, voluntate sufficienter significata, transferri rei dominium potest, ut ante diximus: quid ni ergo

Rhet. i. 15. *Orat.* i. *adv. Aristog.* p. 492. *C. unde Pet. est. L.* 2. *D. de Leg.*

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having been taken, he pronounces that what you ought to do, is not what is promised, but what is for the interest of the promisee:—that the pacts, not having any force of themselves, receive force from the contracts of which they are parts or additions, or from the delivery of the thing in question; whence arise, partly actions, partly exceptions to actions, and prohibitions of suit.

But pacts which have an obligatory force according to the Laws, as pacts with stipulations and some others, have, he holds, this force by the help of the laws, which have this efficacy, that what of itself is proper, they make to be necessary.

3 But this opinion cannot stand, in the general form in which he propounds it. For, in the first place, it follows therefrom that pacts between kings and different peoples, so long as nothing thereof is performed (*re integrâ*) have no force; [the parties being bound by no common instituted law;] especially in those places in which no regular form of treaties and engagements has been introduced.

And again, no reason can be found why laws, which are in a certain way a common pact of the people, and are so called by Aristotle and Demosthenes, should be able to give obligatory force to pacts; while the will of a person, directed especially, and by every means, to put himself under an obligation, should not be able to do so; especially when the Civil Law offers no impediment.

possit transferri et jus in personam, aut ad transferendum dominium (quod jus ipso dominio minus est) aut ad aliquid agendum, quippe cum in actiones nostras par jus habeamus atque in res nostras?

4 Accedit his [a]sapientum consensus: nam quomodo dicitur a Jurisconsultis, nihil esse tam naturale, quam voluntatem domini volentis rem suam in alium transferre ratam haberi; eodem modo dicitur, nihil esse tam congruum fidei humanæ, quam ea quæ inter eos placuerunt servare. Sic edictum de pecunia constituta, ubi nulla in constituente debendi causa præcesserat præter consensum, favere dicitur naturali æquitati. Paulus quoque Jurisconsultus cum ait natura debere, quem jure gentium dare oportet, cujus fidem secuti sumus: quo in loco primum vox, *oportet*, necessitatem quandam moralem significat: neque vero admittendum est, quod ait Connanus, fidem secutos nos censeri, ubi res integra esse desiit: agebat enim eo loco Paulus de condictione indebiti: quæ cessat si ex qualicunque pacto solutum quid sit,

§ Per Trad. 40. Inst. de Rer. Divis.

L. 1. D. de Pact.

L. 1. D. de Pec. Const.

L. cum Amp. 84. § 1. D. de Reg. Jur.

[a] *Sapientum consensus*] Ita ut et silentium in re moram non ferente vim sponsionis habere velint Hebræi. *Baba Kama* cap. x. § 4. [Vide ibi *Commentar.* Constantini Lempereur.]

Add to this, that when the will is sufficiently signified, the ownership of a thing may be transferred, as we have already said: why then may there not also be a transfer of a *jus in personam*, a right to the performance of a person's promise, or a right to transfer ownership (which is a less thing than ownership itself,) or a right to do anything; since we have the same right over our actions as over the things which belong to us?

4 To this is to be added the consent of wise men; for as it is said by jurists, that nothing is so natural as that the will of the owner when he wishes to transfer to another a thing which is his, should be held valid; in the same way it is said that nothing is so congruous to the mutual confidence of mankind, as to perform the agreements which have been made among men. Thus the edict concerning paying money agreed to be paid at a certain time, when in the person so agreeing no cause had preceded except consent, is said to favour natural equity. Paulus also says, that a man owes us a debt, when, *jure gentium*, he ought to give it us, we relying upon his good faith; in which place, first, the word *ought* implies a certain moral necessity: nor can we admit what Connanus says, that we rely upon a man's good faith, only when some step has been taken in agreement with the promise: for in that place Paulus was speaking of an action for recovering what has been paid and was not owing: which falls to the ground, if the

quia jam ante, re adhuc integra, naturæ ac gentium jure dari oportebat, etiamsi lex civilis ad præscindendas litium occasiones auxilium suum non præstabat.

De Offic. i. 7. 5 M. autem Tullius in *Officiis* tantam promissis vim tribuit, ut fundamentum justitiæ fidem appellet, quam et justi- Lib. i. Od. 24. tiæ sororum dixit Horatius, et Platonici sæpe justitiam vocant App. *de Hab. Plat. Doctr.* ii. p. 15. *in fin.* ἀλήθειαν, quod fidelitatem transtulit Apuleius: ac Simonides justitiam definiebat, non modo acceptum reddere, sed et verum Apud Plat. i. *De Rep.* p. 331 c, d. dicere.

6 Sed ut bene res intelligatur, [2]distinguendi sunt diligenter tres gradus loquendi de rebus futuris quæ nostræ sunt potestatis, aut fore putantur.

II. Primus gradus est assertio explicans de futuro animum qui nunc est: et ad hanc, ut vitio careat, requiritur veritas cogitationis pro tempore præsenti, non autem ut in ea cogitatione perseveretur. Habet enim animus humanus non tantum naturalem potentiam mutandi consilium, sed et jus. Quod si in mutatione sententiæ vitium sit aliquod, aut accedit, id non est intrinsecum mutationi, sed ex materia, puta quia prior sententia erat melior.

[2] Vide, in hanc rem, Pufendorf. *De Jure Nat. et Gent.* Lib. iii. cap. 5. § 5. et seqq. *J. B.*

[b] *Deum ipsum*] Ita Baldus in Lib. i. D. *de Pactis.*

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money be paid in virtue of a compact of any kind whatever: for then, even before any step had been taken (*re adhuc integra,*) by Natural Law and *jure gentium,* it ought to be paid; even if the Civil Law did not lend its aid, to cut off occasions of litigation [by stopping the action after it has been paid].

5 Cicero, in his *Offices,* gives so much weight to promises, that he calls good faith the foundation of justice. So Horace: and the Platonists often call Justice, *Truth,* or *Truthfulness,* which Apuleius translates *Fidelitas.* Simonides, as quoted in Plato's *Republic,* says that justice is, to return what is entrusted to us, and to speak the truth.

6 But in order that the thing may be well understood, there are three ways of speaking concerning the future, which must be carefully distinguished.

II. The first degree is an assertion explaining our present purpose with respect to some future action: [*I intend to give you:*] and that this may be free from fault, a requisite is, a truth of the thought for the present time, but not that the thought be persevered in. For the human mind has not only a natural power of changing its purpose, but also a right. And if there be any fault in the change,

III. Secundus gradus est, cum voluntas se ipsam pro futuro tempore determinat, cum signo sufficiente ad indicandam perseverandi necessitatem. Et hæc pollicitatio dici potest, quæ seposita lege civili obligat quidem, aut absolute, aut sub conditione, sed jus proprium alteri non dat. Multis enim casibus evenit, ut obligatio sit in nobis, et nullum jus in alio: sicut in debito misericordiæ et gratiæ reponendæ apparet, quibus simile est hoc debitum constantiæ sive fidelitatis. Itaque ex tali pollicitatione res pollicitantis retineri, aut is ipse qui pollicitus est ad implendam fidem cogi jure naturæ non poterit.

IV. 1 Tertius gradus est, ubi ad determinationem talem accedit signum volendi jus proprium alteri conferre: quæ perfecta promissio est, similem habens effectum qualem alienatio dominii. Est enim aut via ad alienationem rei, aut alienatio particulæ cujusdam nostræ libertatis. Illuc pertinent promissa dandi, huc promissa faciendi. Ejus quod dicimus insigne nobis argumentum præbent divina oracula, quæ nos docent [b]Deum ipsum, qui nulla constituta lege obstringi

or accessory to it, that is not intrinsic to the change, as a change, but belongs to the matter; for instance, if the first intention was the better of the two.

III. The second degree is, when the will determines itself for a future time, with a sufficient sign to indicate the necessity of persevering [*I will give you*]. This may be called *pollicitation;* it is obligatory without the Civil Law, either absolutely or conditionally, but it does not give to another person a proper right*. For in many cases it happens that there is an Obligation in us, and no corresponding Right in another: as appears in the duties of mercy and gratitude; and to these, the duty of constancy or fidelity is similar. Therefore in virtue of such pollicitation, the thing so promised cannot be retained, or he who made the promise be compelled by Natural Law to fulfil it.

IV. 1 The third degree is, when to such a determination is added a sign of wishing to confer a proper right upon another: [*I promise you:*] which is a perfect promise, with the same effects as alienation of ownership. For it is either a way to the alienation of the thing, or it is an alienation of some portion of our liberty. To the former head belong promises to give, to the latter, promises to do.

A strong example of what we say is furnished by the Scriptures, which teach us that God himself, who cannot be compelled by any

* It is better to use *Obligation* only as correlative to *Right*, and *Duty* when there is no such correlative Right, but a moral claim. *E. M.* 84, 89.

potest, contra naturam suam facturum nisi promissa præstaret. Neh. ix. 8; Heb. vi. 18, et x. 23; 1 Cor. i. 9, x. 13; 1 Thess. v. 24; 2 Thess. iii. 3; 2 Tim. ii. 13. Unde sequitur, ut promissa præstentur venire ex natura immutabilis justitiæ, quæ Deo et omnibus his qui ratione utuntur, suo modo com-
Prov. vi. 1. munis est. Accedit judicium Salomonis: *Fili mi, si quid spopondisti alteri, defixisti externo volas tuas, illaqueatus es verbis oris tui: captus es enuntiationibus oris tui.* Et hinc Hebræis promissio vocatur אסרה *vinculum*, et [c] voto comparatur, Num. xxx. 4, 5, 6. Similis origo vocis ὑποσχέ-
v. 349. σεως notata Eustathio ad secundum Iliados: ἁλίσκει γάρ πως καὶ κατέχει τὸν ὑποσχόμενον ὁ τὴν ἐπαγγελίαν δεξάμενος. [d] *Capit ac vincit quodammodo promissorem is,*
v. 52. *cui fit promissio.* Quem sensum non male secundo *Metamorphoseon* expressit Ovidius, ubi promissor ei cui promiserat ait: *Vox mea facta tua est.*

2 His cognitis non difficulter respondebimus ad Connani argumenta. Nam jurisconsultorum dicta de pactis nudis respiciunt [e] id, quod Romanis legibus erat introductum, quæ deliberati animi signum certum constituerunt stipulationem. Neque negamus similes esse in aliis populis leges. *Quæ lex*

c *Voto comparatur*] *Quasi paciscuntur cum Diis homines oblatione votorum.* Schol. Horatii. (In III. *Od.* 29. v. 59.)

d *Capit ac vincit*] Inde vincula fidei dicta. Donatus *ad Eunuchum.* (Act. I. Sc. 2. vers. 22.)

e *Id, quod Romanis legibus erat introductum*] Caute Paulus *Sententiarum,* Lib. II. Tit. 14. *Si pactum nudum de præstandis usuris interpositum est, nullius est momenti: ex nudo enim pacto*

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instituted law, would act contrary to his nature, except he performed his promises. [See the passages.] Whence it follows, that the performance of promises proceeds from the nature of immutable justice, which is, in a certain way, common to God and to all rational creatures. So Prov. vi. 1. A promise is spoken of as indissoluble: and a vow. Numb. xxx. 4, 5, 6. So the word ὑπόσχεσις is explained by Eustathius. So Ovid. [See.]

2 This being understood, we shall have no difficulty in replying to Connanus's arguments. For the *dicta* of jurists respecting nude pacts regard the rule which was introduced by the Roman laws, which made *stipulation* the certain sign of a deliberate purpose. Nor do we deny that similar laws existed in other nations. *What law obliges us to perform what we have promised to any one?* says Seneca, speaking of human law [Natural Law], and a promise not made with formal solemnity.

ad id præstandum nos quod alicui promisimus obligat? ait Seneca de lege humana et [f]promisso non solenniter facto loquens. *V. de B. n. f.* c. 21.

3 Possunt autem naturaliter deliberati animi alia esse signa præter stipulationem, aut si quid ei simile ad actionem pariendam lex civilis postulat. Quod autem fit animo non deliberato, id nos quoque ad vim obligandi non credimus pertinere; quod et Theophrastus libro de legibus notaverat: *Apud Stob. Serm.* 44. imo et quod deliberato fit, sed non eo animo ut jus proprium concedat alteri, ex eo negamus jus exigendi cuiquam naturaliter dari, quanquam non solam hinc honestatem, sed et necessitatem quandam moralem nasci agnoscimus. De eo autem quod ex Cicerone adducitur agemus infra, ubi de interpretatione pactorum sermo erit. Sed quæ ad perfectæ promissionis vim [3]requirantur videamus.

V. 1 Primum requiritur usus rationis: ideo et furiosi, et amentis, et infantis nulla est promissio. Aliud censendum de minoribus, hi enim etsi non satis firmum judicium habere credantur, ut et fœminæ, id tamen nec perpetuum est, nec per se sufficit ad actus vim elidendam.

2 Quando autem puer ratione uti incipiat, non potest

inter cives Romanos actio non nascitur. § 1.

[f] *De promisso non solemniter facto loquens*] Id est, non sponso. Sic epistola XIX. distinguit: *Jam non promittunt de te, sed spondent.* Stipulatus et sponsio, verborum solennitas dicitur Paulo, Lib. V. *Sententiarum*, (Tit. 7. § 1.) et Caio titulo de obligationibus quæ ex consensu fiunt. (II. 9. 4.)

[3] Confer PUFENDORF. *De Jure Nat. et Gentium*, Lib. III. cap. vi. *J. B.*

3 There may, however, by Natural Law, be other signs of a deliberate purpose, besides the formality of *stipulation*, or anything else which the Civil Law requires as a ground for an action. But what is done not of deliberate intention, we also do not hold to have the force of obligation, as Theophrastus also had noted. And even as to that which is done with deliberate intention, but not with a purpose of conceding a proper right to another, we deny that it gives to any one a right of demanding the performance by Natural Law: though, in this case, we allow that not only a propriety, but even a moral necessity arises.

As to what is adduced from Cicero, we shall treat below, when we have to speak of the interpretation of pacts.

V. But let us see what conditions are required to produce the force of a perfect promise.

1 First there is required the use of reason: and therefore mad-

certo definiri: sed ex quotidianis actibus, aut etiam ex eo quod communiter in quaque regione accidit, desumendum est. Itaque apud Hebræos valebat promissio quam fecisset adolescens qui annum implesset decimum tertium: puella quæ duodecimum. Alibi leges civiles, justa ratione motæ, quasdam promissiones pupillorum ac minorum irritas pronuntiant, non apud Romanos tantum, sed et apud Græcos, ut notatum
Orat. lxxiv. p. 638 D. Dioni Chrysostomo oratione LXXV. adversus quasdam restitutionis beneficium introducunt: sed hi effectus sunt proprii legis civilis, ac proinde cum jure naturæ ac gentium nihil habent commune; nisi quod quibus locis obtinent, ibi eas servari etiam naturale est. Quare etiamsi peregrinus cum cive paciscatur, tenebitur illis legibus: quia qui in loco aliquo contrahit, tanquam subditus temporarius legibus loci subjicitur.

3 Plane aliud erit si in mari pactio fiat, aut in vacua insula, aut per litteras inter absentes. Talia enim pacta jure solo naturæ reguntur, ut et pacta eorum qui summam habent

[4] Vide infra, cap. 14. hujus Libri, § 2. *J. B.*

[g] *Si lex fundetur in præsumptione aliqua facti*] Exemplum vide in l. man-

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men, and idiots, and children, cannot make a promise. With regard to minors, the case is different; for although these are conceived not to have a sufficiently stable judgment, as also women are not, yet this state is not perpetual, nor is it of itself sufficient to nullify the force of a promise.

2 When a boy begins to have the use of his reason, cannot be defined with certainty: but the inference is to be made from his daily acts, or from that which commonly happens in each country. So among the Hebrews, a promise was valid which was made by a boy after he was thirteen years old, or a girl after twelve. Elsewhere, the Civil Laws, moved by good reasons, pronounce certain promises of wards or minors to be void, not only among the Romans, but also among the Greeks, as Dio Chrysostom notes; and against some such promises, they introduce the benefit of restitution. But these are properly effects of Civil Law, and therefore have nothing to do with Natural Law and *jus gentium;* except that when they obtain, it is agreeable to Natural Law that they be observed.

Hence even if a stranger make an agreement with a citizen, he is bound by the same laws: because he who makes a contract in any place, is under the laws of the place as a temporary subject*.

3 It is plainly another matter if the compact be made at sea,

* *Lex loci contractus: E. M.* 1106.

potestatem, qua tales sunt. Nam in his quæ privatim agunt locum habent leges etiam quæ irritum actum faciunt, ubi id in favorem ipsorum fit, [4]non in pœnam.

VI. 1 De pacto errantis perplexa satis tractatio est. Nam distingui solet inter errorem circa substantiam rei, et qui non sit circa substantiam: an dolus causam dederit contractui, an non: fueritne alter, quicum actum est, doli particeps: sitne actus stricti juris an bonæ fidei. Nam pro harum rerum varietate alios actus irritos pronuntiant scriptores, alios validos quidem, sed ut arbitrio ejus, qui læsus est, rescindi possint, aut reformari. Sed harum distinctionum pleræque veniunt ex jure Romano, tum civili vetere, tum prætorio: quædam etiam non satis veræ aut accuratæ sunt.

Anton. p. 2. *Tit* 1. c. 17. § 6. *Dd. ad l. Contract. de Reg. Jur.* Covar. *de Contract.* q. 57. Medin. *c. de Rest.* q. 35.

2 At viam nobis reperiendæ naturali veritati pandit, quod de legum vi atque efficacia omnium ferme consensu receptum est, ut [5]si lex fundetur in præsumtione aliqua facti, quod factum revera ita se non habeat, tunc ea lex non obliget, quia veritate facti deficiente, deficit totum legis fun-

Felin. c. 1. *de Const.* n. 40. Bald. *in l. Cum quis C. de Jur. et Fact. Ignor.* Covar. *in c. Possess. de Reg. Jur.* in 6. p. 2. § 6. n. 8. et Navar. c. 12. n. 13.

cipia, 5. *C. de Servis fugitivis.* apud Gailium, Lib. I. Obs. 2. Num. 7. apud Molinæum *ad Consuet. Paris.* Tit. 1. § 13. Gl. 3.

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or in a desert island, or by letter between persons absent. For such pacts are governed by Natural Law only; as also the pacts of sovereigns as such. For in the private acts of sovereigns, those laws have place which make the act void, when it is in their favour, not to their detriment.

VI. 1 The discussion of pacts made in error* is sufficiently perplexed. For a distinction is commonly made between an error as to the substance of a thing, and an error not about the substance: as, whether fraud was the occasion of the contract: whether the person with whom the contract was made was a party to the fraud: whether it be an action *stricti juris* or *bonæ fidei*†. For, according to these variations, writers pronounce some acts void, others, valid, but open to be rescinded or remodelled at the choice of him who is injured. But the greater part of these distinctions come from the Roman Law, both the old Civil Law, and the decisions of Prætors; and some of them are not sufficiently true or accurate.

2 But the way to find the natural truth, is opened to us by a principle concerning the force and efficacy of laws, which is received by an almost universal consent:—that if the law be founded on the presumption of some fact, which fact is really not so, then that law does not oblige: because, the truth of the fact failing, the whole founda-

* Of Erroneous Promises, see *E. M.* 281. † *E. M.* 717, 718.

damentum. Quando autem lex in tali præsumtione sit fundata, ex legis materia, verbis, et circumstantiis colligendum. Similiter ergo dicemus, [h]si promissio fundata sit in præsumtione quadam facti quod non ita se habeat, naturaliter nullam ejus esse vim: quia omnino promissor non consensit in promissum, nisi sub quadam conditione quæ re ipsa non extitit: quo referenda est illa quæstio apud Ciceronem *de Oratore*
Cap. 33. primo de eo, qui filium suum mortuum falso credens alium instituerat heredem.

3 Quod si promissor negligens fuit in re exploranda, aut in sensu suo exprimendo, [5]et damnum inde alter passus sit, tenebitur id resarcire promissor, non ex vi promissionis, sed ex damno per culpam dato, de quo capite infra agemus. Si vero adfuerit quidem error, sed in quo fundata non fuerit promissio, ratus erit actus, utpote non deficiente vero consensu: sed hoc quoque casu si is cui promittitur dolo errori causam dederit, quicquid ex eo errore damni promissor fecit, resarcire tenebitur, ex alio illo obligationis capite. Si

[h] *Si promissio fundata sit in præsumtione quadam facti quod non ita se habeat*] Seneca *de Beneficiis* IV. c. 36. *Demens est qui fidem præstat errori.*

[5] Alia heic est ratio *Promissi mere gratuiti*, alia *Promissi mutui*. In priori, modo bona fide egerit Promissor, ad nihil amplius tenetur. In posteriori, ex circumstantiis judicandum, an ob negligentiam in re exploranda, aut sensu suo

tion of the law is wanting. But *when* the law *is* founded on such a presumption, is to be collected from the matter, words, and circumstances of the law. In like manner then we shall say, that when a promise is founded on the presumption of some fact which is not really so, that by Natural Law it has no force: because the Promiser does not agree to the promise except on a certain condition which in reality did not exist: to which we must refer Cicero's question concerning the person who, falsely believing his son to be dead, made another person his heir.

3 But if the promiser has been negligent in inquiring into the matter, or in expressing his intention, and another person has thereby suffered loss, the promiser will be bound to make that loss good; not by the force of his promise, but as having done damage by his fault; of which head we shall hereafter treat. But if there was indeed an error, but one on which the promise was not founded, the act will be valid, a true consent being there not wanting. But in this case also, if he to whom the promise is made, fraudulently give occasion to the error, *he* will be bound to make good whatever damage the promiser has done from that error, from that other head of obligation. If the

pro parte fundata erit in errore promissio, valebit pro reliqua parte.

VII. 1 De eo quod metu fit, non minus implicita tractatio est: nam et hic distingui solet inter metum gravem absolute, vel ratione habita personæ metuentis, et levem; illatum juste et injuste; ab eo, cui promittitur, vel ab alio: item inter actus liberales et onerosos: et pro his diversitatibus alii actus dicuntur irriti, alii ad arbitrium promittentis revocabiles, alii in integrum restituendi: non sine magna sententiarum varietate circa hæc singula.

2 Ego omnino illorum accedo sententiæ, qui existimant, seposita lege civili, quæ obligationem potest tollere aut minuere, eum qui metu promisit aliquid, [6] obligari: quia consensus hic adfuit, nec conditionalis, ut modo in errante dicebamus, sed absolutus. Nam ut recte ab Aristotele traditum est, qui naufragii metu res suas jactat, vellet res servare sub conditione, si naufragium non immineret; at absolute vult res perdere, spectata scilicet temporis ac loci circumstantia.

Sylv. *Verb. Met.* q. 8.

Eth. Nic. iii. 1.

exprimendo, Promissor teneatur. Diximus in Notis Gallicis ad hunc locum. *J. B.*

[6] Minime obligatur. Vide quæ, post PUFENDORFIUM, diximus, *De Jure Nat. et Gent.* Lib. III. cap. 6. § 9. et seqq. *J. B.*

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promise was founded partly in error, it will be valid as to the remaining part.

VII. 1 Of promises made through fear*, the treatment is no less entangled. For here too a distinction is commonly made between a fear which is grave, either absolutely, or with reference to the person who fears, and a slight fear; between fear impressed justly and unjustly; by the promisee, or by another: also between acts of liberality, and acts of mutual promise. And according to these diversities some acts are declared void; others, revocable at the choice of the promiser; others, cases for entire restitution; not without great variety of opinion on these particular cases.

2 I am entirely of the opinion of those who think that, setting aside the Civil Law, which may either take away or diminish an obligation, he who has promised any thing under fear, is bound †: for here was consent, not conditional, as in the case of erroneous promises, but absolute. For as Aristotle says, he, who in fear of shipwreck,

* Of Extorted Promises, see *E. M.* 292.

† *Obligatur,* says Grotius: *minime obligatur,* says Barbeyrac, and refers to his notes on Puffendorf. See for the reasons why he is bound, *E. M.* 295.

Sylv. *Verb. Rest.* 2. *Dict.* 7. Navar. c. 17. n. 15. et c. 22. n. 51. § 7. Covar. *ad c. Pec* p. 2. § 3. n. 7.

Sed illud simul verissimum censeo, si is cui promittitur metum intulerit non justum, sed injustum, quamvis levem, atque inde secuta sit promissio, eum teneri ad liberandum promissorem si promissor velit; non quod inefficax fuerit promissio, sed ob damnum injuria datum, quod quam habeat exceptionem ex jure gentium, [i]infra suo loco explicabitur.

L. 14. § 3. *D. quod Met. Caus.*

3 Quod vero quidam actus rescinduntur [k]ob metum ab alio incussum, quam quicum actum est, ex lege est civili, quæ sæpe etiam actus libere factos ob judicii infirmitatem, aut irritos facit aut revocabiles. Quæ autem de legum civilium vi atque efficacia supra diximus, eadem hic volumus haberi repetita. At quæ ad promissiones firmandas vis sit jurisjurandi, infra videbimus.

VIII. 1 Materiam promissi [7]quod attinet, eam oportet esse, aut esse posse in jure promittentis, ut promissum sit efficax. Quare primum non valent promissa facti per se illiciti: [8]quia ad illa nemo jus habet, nec potest habere. At

[i] *Infra suo loco explicabitur*] Hoc libro, Tit. XVII. § 19. et libro III. c. xix. § 11.

[k] *Ob metum ab alio incussum*] Seneca naturam secutus libro IV. controversiarum, controversia XXVII. *Ita rescinduntur quæ per vim et necessitatem gesta sunt, si vis et necessitas a paciscente adhibita est. Nihil enim, inquit, mea, an tu cogaris, si non a me cogeris. Meam culpam oportet esse, ut mea pœna fit:* confer quæ infra libro III. c. xix. § 4.

[7] Confer hac de re PUFENDORFIUM,

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throws his goods overboard, would wish to keep them, conditionally, if there was not the danger of shipwreck; but, absolutely, he is willing to lose them, considering the circumstances of time and place.

But I also think that this is certainly true; that if the promisee has produced a fear, not just, but unjust, even though slight, and if the promise was occasioned by this, he is bound to liberate the promiser if the promiser desires it; not because the promise was invalid, but on account of the damage wrongfully done: what exception to a demand this gives rise to, we shall explain in its own place below.

3 That some of our acts are rescinded on account of fear impressed on us by another person than the one with whom we treat, is a matter of Civil Law, which often also makes either void or revocable acts freely done; on account of infirmity of judgment. And what we have said above, of the force and efficacy of Civil Laws, is to be understood as repeated here.

What is the efficacy of an Oath in making promises hold, we shall see below.

VIII. 1 As to what concerns the *matter* of promises, a condition to produce a perfect promise is, that it is, or may be, in the rightful

promissio, ut supra diximus, vim accipit ex jure promittentis, nec ultra extenditur. Agesilaus de promisso interpellatus respondit: ναὶ δῆτα, εἰ δ' ἔστι δίκαιον· εἰ δὲ μή, ἔλεξα μέν, ὡμολόγησα δ' οὔ· *bene, si justum est: sin minus, dixi tantum, non et promisi.* Plut. *Apoph. Lac.* p. 208 c.

2 Quod si res nunc non sit in potestate promittentis, sed esse aliquando possit, erit in pendenti efficacia; quia tum promissio facta censeri debet sub conditione, si res in potestatem venerit. Quod si conditio, qua res in potestatem promissoris venire possit, ipsa quoque sit potestativa, tenebitur promissor facere quidquid moraliter æquum est ut ea impleatur.

3 Sed in hoc quoque genere lex civilis utilitatis causa multa irrita solet facere, quæ naturaliter obligarent: ut promissum futuri matrimonii factum ab eo cave, qui conjugem nunc habeat, et non pauca quæ a minoribus, aut filiis familiarum fiunt.

De Jure Nat. et Gent. Lib. III. cap. 7. *J. B.*

[8] De validitate et effectibus Promissorum aut pactorum illicitorum fuse et nove egi ad PUFENDORFIUM, *De Jure Nat. et Gentium*, dicto Cap. 7. Lib. III. Not. 2. alterius Editionis. Principiorum autem ibi positorum usum ostendendi, eaque defendendi, in argumento insigni, de Alea nimirum, occasionem postea habui, duabus Epistolis, quæ reperiuntur in *Ephemeridibus Eruditorum Parisiensibus*, Octobr. 1712. et Decembr. 1713. *Edit. Amstelod.* *J. B.*

disposal of the promiser. Whence, first, promises are not valid, to do an act in itself unlawful; for such a right no one has nor can have. But a promise, as we have said above, receives its force from the right of the promiser, and cannot be extended further. When Agesilaus was interrogated concerning a promise which he had made, he said: *If it be just, well and good: if not, I said, but I did not promise.*

2 If the matter be not now in the power of the promiser, but may at some time be so, the efficacy of the promise will be suspended: because then, the promise must be supposed to be made under the condition, if the thing come into his power. But if the condition under which the thing may come into the power of the promiser, be also *potestative* [such as he can himself bring about or accelerate], the promiser is bound to do whatever is morally equitable, in order that the condition may be fulfilled.

3 But in such cases also, the Civil Law is wont to make many things void for the sake of utility, which by Natural Law would be obligatory; as a promise of future marriage, made by a man or woman who has a spouse alive; and not a few things done by minors or sons of families.

IX. Quæri hic solet, an promissio facta ob causam naturaliter vitiosam ipsa natura valeat, ut si quid promittatur homicidii perpetrandi causa. Hic ipsam promissionem vitiosam esse satis apparet: in hoc enim adhibetur, ut alter impellatur ad malum facinus. Sed non quicquid vitiose fit effectu juris caret, quod in prodiga donatione apparet. Hoc interest, quod donatione facta jam cessat vitiositas: nam sine vitio res relinquitur apud donatarium. At in promissis ob causam vitiosam manet vitium, quamdiu non perpetratum est crimen: tamdiu enim impletio ipsa promissi, ut mali illex, labem in se habet, quæ cessare incipit peracto crimine. Unde sequitur usque ad id tempus promissionis talis efficaciam esse in pendenti, ut modo dicebamus in promissa re quæ juris nostri non est: crimine vero perpetrato, jam obligationis vim exseri, quæ ab initio non intrinsecus defuit, sed ab accedente vitio fuit impedita. Ex hujus rei exemplum afferri potest in Juda Jacobi filio, qui Thamari, quam meretricem putabat, promissam mercedem, [1]tanquam debitam, persolvit. Quod si injustitia promissarii causam promissioni dederit, aut inæqua-

Cajet. 2. 2. q. 32. art. 7.

Gen. xxxviii.

[1] *Tanquam debitam*] Natura scilicet, secundum cujus legem tunc vivebatur. Aliter ex jure civili judicavit C. Aquilius teste Valerio Maximo, Lib. VIII. c. xi. n. 2.

[m] *De qua mox videbimus*] Cap. xii. § 9, 10, 11.

[9] Confer PUFENDORFIUM, *De Jure*

IX. It is commonly made a question, whether a promise made for a cause naturally vicious is valid by Natural Law; as if any thing be promised for committing homicide. Here it is evident enough that the promise itself is vicious, for it is made that another person may be induced to commit a crime. But what is done viciously, is not necessarily void, as to its jural effects; as appears by the case of a prodigal donation. There is however this difference; that when the donation is made, the viciousness ceases: for there is no vice in the thing being left in the hands of the donatary. But in promises made for a vicious cause, the vice remains as long as the crime is not perpetrated: so long, the fulfilment of the promise, as a stimulus to evil, has a taint in it which ceases when the crime is committed. Whence it follows, that up to that time, the efficacy of such a promise is suspended, as we said above, in speaking of promising a thing which is not ours to give: but the crime being perpetrated, the force of the obligation comes into play, having been intrinsically in existence from the first, but barred by the vice which was connected with it. We have an example of this in Judah, who paid to Thamar her hire, deeming her a harlot.

litas sit in contractu, hæc quomodo sint resarcienda alia est quæstio, [m] de qua mox videbimus.

X. Quod vero promittitur ob causam ante debitam, non eo minus debetur, si jus naturale spectemus, secundum ea quæ de rei alienæ acceptione supra diximus: nam et sine ulla causa promissum naturaliter deberetur. Sed hic quoque damnum per extorsionem datum, aut inæqualitas in contractu reparanda venient, secundum tradendas inferius leges.

XI. Modum promittendi quod attinet, is, ut de dominii translatione diximus, requirit actum externum, id est signum sufficiens voluntatis, quale interdum esse potest nutus, frequentius autem vox aut literæ.

XII. Sed et per hominem alterum [9] obligamur, si constet de voluntate nostra qua illum elegerimus, [n] ut instrumentum nostrum ad hoc speciatim, aut sub generali notione. Et in generali præpositione accidere potest, ut nos obliget qui præpositus est, agendo contra voluntatem nostram sibi soli significatam: quia hic distincti sunt actus volendi: unus quo nos obligamus ratum habituros quicquid ille in tali negotiorum

Nat. et Gent. Lib. III. cap. 9. *J. B.*

[n] *Ut instrumentum nostrum*] Servius ad illud *Æneidos* IX. vers. 361. *Hospitio cum jungeret absens, per internuntios* ait. Vide quæ supra ad caput VI. § 2.

But if the wrong of the promisee gave occasion to the promise, or there be an inequality in the contract, how these things are to be remedied, is another question, hereafter to be considered.

X. What is promised, for a consideration which was due without the promise, is still to be paid, if we look at Natural Law, according to what we have said above of the acceptance of a thing belonging to another. (II. X. 11 and 12.) But here also the damage produced by extortion, or the inequality of the contract, will require to be repaired, according to rules hereafter to be given.

XI. As to what concerns the mode of making the promise, that, as we said of the transfer of ownership, requires an external act; that is, a sufficient sign of the will, which sometimes may be a nod, but more frequently, the voice or writing.

XII. We may also be bound by means of another man, if there be clear evidence of our purpose in appointing him as our instrument either for this special purpose, or in a general manner. And in a general appointment, it may happen that the person appointed binds us, when he acts contrary to our will signified to him alone. For here there are two distinct acts of willing: one by which we obliged ourselves to hold valid whatever he does in this kind of business; another,

genere fecerit, alter, quo illum nobis obligamus ut non agat nisi ex praescripto, sibi non aliis cognito. Quod notandum est [o]ad ea, quæ Legati promittunt pro Regibus ex vi instrumenti procuratorii, excedendo arcana mandata.

XIII. Atque hinc etiam intelligi potest exercitoriam et institoriam, quæ non tam actiones sunt quam qualitates actionum, ipso naturali jure niti. Adjiciendum hic est male Romanis legibus introductum, ut ex facto magistri exercitores in solidum singuli tenerentur. Nam hoc naturali æquitati convenit, [1]quæ satis habet si pro suis singuli partibus conveniantur, nec publice utile est: absterrentur enim homines ab exercendis navibus, si metuant ne ex facto magistri quasi in infinitum teneantur. Atque adeo apud Hollandos, ubi mercatura pridem maxime viguit, et nunc et olim lex illa Romana observata non est: imo contra, constitutum, ne exercitoria etiam universi amplius teneantur, quam ad æstimationem navis, et eorum quæ in navi sunt.

XIV. Ut autem promissio jus transferat, [p]acceptatio hic

[o] *Ad ea quæ legati promittunt pro regibus ex vi instrumenti procuratorii excedendo arcana mandata*] Vide exemplum apud Marianam xxvii. 19. Aliud apud Guicciardinum, Tom. I.

[1] At vero qui cum Magistro navis contraxit, censetur non cum hoc vel illo Exercitore, sed cum omnibus in universum contraxisse. Rationi etiam ex utilitate publica petitæ, est quod opponi queat, validius forte. Plura diximus in Notis nostris Gallicis. *J. B.*

in which we put him under an obligation to us, not to act except according to our directions, known to him and not to others, which is to be noted in those things which Envoys promise for kings in virtue of their written powers, when they go beyond their secret instructions.

XIII. Hence we may understand that an *exercitorian* action (one against ship-owners for the contracts of the captain,) and an *institorian* action, (one against the owner of a trading concern for the contracts of the acting agent,) depend on Natural Law, being, not so much distinct kinds of action, as qualities of actions. But it has been improperly added by the Roman Law, that all the ship-owners are bound severally, as well as jointly, by the acts of the captain. This is neither in accordance with natural equity, which is satisfied if each owner is responsible for his own share; nor useful to the public; for persons are deterred from sending adventures in ships, if they are in fear that they may be indefinitely involved by the acts of the captain. And therefore in Holland, where commerce has long flourished, that Roman law neither prevailed formerly, nor does now; on the contrary, it is the law that, in an exercitorian action, even the whole body of owners are not held responsible, beyond the value of the ship and cargo.

non minus quam in dominii translatione requiritur, [2]ita tamen ut hic quoque præcedens rogatio durare intelligatur, ac vim habere acceptationis. Nec obstat quod de pollicitationibus factis civitati jure civili est proditum: quæ ratio quosdam induxit, ut jure naturæ solum promittentis actum sufficere judicarent: nam lex Romana non hoc dicit, ante acceptationem pollicitationis plenam esse vim; sed revocari vetat, [q]ut acceptari semper possit: qui effectus non est naturalis, sed mere legitimus: cui non dissimile est quod pro infantibus et amentibus jus gentium introduxit. Nam pro his, ut possidendi res quæ possessione quæruntur, ita et acceptandi animum jus supplet.

L. qui abs. 38. prin. D. Acq. Poss. Gom. Tom. II. c. 9. n. 1.

Molin. *Disp.* 263.

Vid. hoc Lib. cap. iii. § 6. et iv. § 10.

XV. Illud etiam quæri solet, an satis sit acceptationem fieri, an vero etiam innotescere debeat promissori, antequam promissio plenum effectum consequatur. Et certum est utroque modo fieri posse promissionem, aut hoc modo: volo, ut valeat si acceptetur; aut hoc modo: volo, ut valeat si acceptatum intellexero. Et in his quidem quæ ad mutuam perti-

[p] *Acceptatio hic non minus quam in dominii translatione requiritur*] Tertullianus, ut Jurisperitus, libro *de Jejuniis: Votum cum a Deo acceptatum est, legem in posterum facit.* (Cap. xi.)

[2] De hoc jure *Acceptationis* vide PUFENDORF. *de Jure Nat. et Gent.* Lib. III. cap. vi. § 15. *J. B.*

[q] *Ut acceptari semper possit*] Vide similem legem Wisigotthorum, Lib. V. Tit. ii. cap. 6.

XIV. In order that a promise may transfer a right, acceptance is required here no less than in the transfer of ownership; but in such a way that here also a precedent asking is understood to remain in force, and to have the effect of acceptance. Nor is this contradicted by what is appointed in the Civil Law, that offers made to the Public are binding; which reason has induced some persons to judge that by the Law of Nature, the act of the promiser alone suffices: for the Roman Law does not say this, that the force of such an offer or *pollicitation* is complete before acceptance; but it forbids it to be recalled, so that it may always be accepted: which effect is not a result of Natural Law, but of Civil Law; very similar to what the *jus gentium* has introduced concerning infants and idiots. For with regard to such persons, both the purpose of taking possession of things which require such a step, and the purpose of acceptance when that is required, are supplied by the law.

XV. The question is also raised, whether it is sufficient that acceptance is made, or whether it must be notified to the promiser before the promise receives its full effect. And it is certain that a promise may be made either way: and also in this way: I desire that

nent obligationem, posterior sensus præsumitur: [3]in promissis vero mere liberalibus potius est ut prior sensus credatur adfuisse, nisi aliud appareat.

L. 6. C. Si quis alt. vel sibi. L. 4. D. de Man. Vind.

XVI. Sequitur hinc, ante acceptationem, quippe jure nondum translato, revocari promissum posse sine injustitia, imo et sine inconstantia, si revera eo animo factum sit, ut ab acceptatione demum valere incipiat. Revocari etiam posse mortuo ante acceptationem eo cui promissum erat, quia videtur acceptatio in arbitrium ipsius collata, non heredum. Aliud enim est velle dare huic jus ad heredes transiturum, [r]aliud velle dare heredibus: multum enim refert in quem beneficium conferatur. Et hoc est quod Neratius respondit, non videri sibi principem quod ei, quem vivere existimabat, concessisset, defuncto concessisse.

L. 191. D. de Reg. Jur.

L. Mand. 57. D. Mand. Clar. Lib. iv. § Don. q. 12.

XVII. 1 Poterit etiam revocari mortuo eo qui lectus erat voluntatis internuncius; quia in illius verbis posita fuerat obligatio. Aliud in tabellario, qui non est instrumentum obligationis, sed perlator instrumenti obligatorii. Itaque literæ

[3] Contrarium mihi verius videtur. Fuse dicemus, Deo dante, in Notis Gallicis ad hunc locum. *J. B.*

[r] *Aliud est velle dare heredibus*] Ideo ad vitandum ambiguum dici solebat: *Illi liberisque ejus.* Servius ad IX.

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it be valid, if accepted: or in this manner: I desire that it be valid, if I shall understand that it has been accepted. And in matters which regard mutual obligation, the latter sense is presumed: but in promises merely liberal, the former meaning rather is supposed to prevail, except the contrary appear, [Barbeyrac dissents from this.]

XVI. Hence it follows, that before acceptance, since the right has not yet been transferred, a promise can be recalled without injustice, and even without inconstancy, if it were really made with the intention that it should begin to be valid on acceptance. Also a promise may be revoked, if the promisee die before acceptance: because the acceptance seemed to be referred to the promiser himself, not his heirs. For it is one thing to wish to give a right which will pass to the heirs; another thing to wish to give it to the heirs: for it makes a great difference on whom the benefit is conferred. And this was Nerat's answer, that he did not think that the prince had conceded to a person defunct what he had conceded to him supposing him alive.

XVII. 1 A promise may also be revoked by the death of him who was chosen to declare to the promisee the promiser's will; for the obligation ended in his words. The case is different in a messenger who carries letters merely, and who is not the instrument of

consensus indices per quemvis perferri poterunt. Distinguendum quoque inter ministrum, qui electus est ut promissionem significet, et inter eum, qui electus est ut ipse promittat. *L. Si Mand. 15. D. Mandati.* Priore casu revocatio vim suam habebit, etiamsi ministro non innotuerit: altero vero irrita erit revocatio; quia jus promittendi ab ipsius voluntate pendebat, quæ voluntas necdum cognita revocatione omni culpa vacabat. Sic etiam priore casu [8]mortuo donatore poterit acceptari donatio, ut perfecta *L. Nec. Amb. 6. C. de Don.* ab una parte, quanquam revocabiliter: quod apertius in legatis conspicere est: altero casu non poterit, quia non facta est, sed mandata fieri.

2 In dubio autem mandantis voluntas fuisse censetur, ut impleatur mandatum, nisi magna mutatio inciderit, qualis est mors mandantis. Possunt tamen suppetere conjecturæ quæ *Covar. Lib. i. Var. c. 14. n. 16. L. Si Pat. 4. D. de Man. Vind.* aliud judicandum suadeant, quæ facile admittendæ sunt, ut subsistat quod pia de causa dari mandatum est. Ac simili modo definiri potest agitata olim controversia, an in heredem mandati detur actio, qua de re aliud M. Drusum præto-

Æneidos. (vers. 302.) Vide et legem Wisigotthorum Lib. v. tit. xi. c. 6.

[8] *Mortuo donatore poterit acceptari donatio*] Vide librum *de Tenuris Angliæ*, cap. 7.

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the obligation, but the carrier of the obligatory instrument; therefore letters indicating consent may be carried by any one. We must distinguish also between a minister who is elected to make known the promise, and him who is elected to make the promise. In the former case, the revocation will have its force, even if it do not become known to the minister: in the other case, the revocation is void, because the right of promising was dependent on the will of the minister or agent, which will, the revocation not being yet known, was free from all fault. So also in the former case, the donation may be accepted, even the donor being dead; as being perfect on one side, although revocably: as may be seen on a large scale in ambassadors: in the other case, the donation cannot be accepted, because it was not really made, but only ordered to be made.

2 But in a doubtful case, the will of the person who gives the order is understood to be, that the order be fulfilled, except some great change take place, as the death of the person ordering. But there may be conjectures which may favour another judgment, which are readily to be admitted, in order that a donation which was directed to be made for a pious cause may subsist. And in like manner may a controversy be decided which was once agitated, whether an action will hold against the heir of a person entrusted with such a charge,

rem, aliud Sextum Julium edixisse refert scriptor ad Herennium lib. ii.

Covar. *c. Quam.* p. 2. § 4. n. 13.

Alex. *Cons.* 2. c. 4 Lib. i. et ibi Car. Mol.

XVIII. 1 Solent et controversiæ incidere de acceptatione [4]pro altero facta: in quibus distinguendum est inter promissionem mihi factam de re danda alteri, et inter promissionem in ipsius nomen collatam cui res danda est. Si mihi facta est promissio, omissa inspectione an mea privatim intersit, quam introduxit jus Romanum, naturaliter videtur mihi acceptanti jus dari efficiendi, ut ad alterum jus perveniat, si et is acceptet: ita ut medio tempore a promissore promissio revocari non possit; sed ego cui facta est promissio eam possim remittere. Nam is sensus juri naturæ non repugnat, et verbis talis promissionis maxime congruit: neque nihil mea interest si per me alter beneficium acquirat.

2 Quod si promissio in nomen ejus collata est cui danda res est, distinguendum est, an qui acceptat, aut speciale mandatum habeat acceptandi, aut ita generale, ut talis acceptatio ei inclusa censeri debeat: an vero non habeat. Ubi man-

[4] Confer Pufendorfium, *De Jure Nat. et Gent.* Lib. iii. cap. 9. § 4, 5. cum Notis nostris. *J. B.*

[5] Difficile admodum est intellectu, quomodo acceptatio fuerit, quæ tamen nullum jus det acceptanti. Re vera heic est tantum nuda *pollicitatio*, ut Auctor vocat supra, § 3. et quidem quæ nullum

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on which subject M. Drusus the prætor and Sextus Julius gave different edicts.

XVIII. 1 Also controversies often occur respecting acceptance made for another: in which a distinction is to be made between a promise made to me, to give a thing to another, and a promise conveyed in the name of him to whom the thing is to be given. If the promise is made to me, omitting the consideration whether the performance of the promise is to my private interest, (which was introduced by the Roman law,) it seems, by the Law of Nature, that I acquire the right of effecting, by my acceptance, that the right promised pass to the other person: so that in the intermediate time the promise cannot be revoked by the promiser; but I, to whom the promise was made, have power to remit it. For that sense is not repugnant to Natural Law, and agrees best with the words of such a promise: nor is it a matter uninteresting to me, that a person should acquire a benefit through me.

2 But if the promise be conveyed in his name to whom the thing is to be given, it is to be distinguished whether he who accepts has either a special mandate to accept, or a commission so general that such acceptance may be included in it; or have not such com-

datum tale antecessit, distinguendum ultra non puto, sitne persona sui juris necne, quod Romanæ leges volunt, sed plane ex tali acceptatione promissionem perfici: quia consensus potest et per ministrum interponi ac significari. Velle enim censeor quod in alterius voluntate posui, si et ille velit. Deficiente autem mandato, si alius cui promissio facta non est, acceptet, volente promissore, tunc is erit effectus, ut promissori revocare promissionem non liceat, antequam is, quem spectat promissio, eam ratam habuerit aut irritam: sic tamen, ut medio illo tempore is, qui acceptavit, remittere promissum non possit, quia hic non adhibitus est ad jus aliquod accipiendum, [5] sed ad adstringendam promissoris fidem in sustentando beneficio: ita ut promissor ipse si revocet faciat contra fidem, non contra jus proprium alicujus.

XIX. Ex superioribus intelligi etiam potest, quid sentiendum sit de onere adjecto promissioni. Id enim fieri poterit quamdiu promissio completa nondum est per acceptationem, nec fide interposita facta irrevocabilis. Onus autem in com- *L. Perf. 4. C. de Donat. quæ sub modo. Bart. in l. Qui Romæ. § Flav. de Verb. Oblig.*

potest habere effectum, antequam is, quem spectat promissio, eam ratam habuerit: quum in pollicitatione facta illi ipsi, quem spectat, nulla alia hujus acceptatio requiratur, si promissio imperfecta postea in perfectam mutetur. Plura diximus in Notis Gallicis ad hunc locum. *J. B.*

mission. When such a mandate has proceeded, I do not think that any further distinction is to be made, (as the Roman Laws direct,) whether the person be his own master or not, but that by such acceptance the promise becomes perfect: because consent may be given and signified by a minister. For I am supposed to wish what I have put in the power of another, if he too wishes it. But, failing such a mandate, if another, to whom the promise was not made, accepts, the promiser being willing, the effect will then be this; that the promiser will not have power to revoke his promise, before he whom the promise concerns, has determined that it shall be valid or invalid: but so that, in the intermediate time, he who has accepted the promise cannot remit it, because he was not employed to receive any right, but to bind the good faith of the promiser in maintaining a proposed benefit: so that the promiser, if he revoke, acts against good faith, but not against the right of any one.

XIX. From what has been said, it may be collected what is to be decided concerning a burthen added to a promise. For this may be done, so long as the promise is not yet completed by acceptance, nor made irrevocable by an especial engagement. But a burthen, added for the convenience of a third party, may be revoked, as

modum tertii adjectum promissioni revocari poterit, quamdiu a tertio acceptatum non erit: quanquam non desunt tam in hac quam in aliis quæstionibus qui secus sentiant. Sed recte rem inspicienti facile elucet naturalis æquitas, ut multis probationibus non egeat.

XX. Solet et illud disputari, quomodo convalescere possit promissio cui error causam dedit, si re cognita promissor stare velit promisso. Atque idem quæri potest de promissionibus, quibus lex civilis impedimentum injicit ex metu aut causa alia, si ista causa postea cessaverit. Nam ad hæc firmanda quidam solum actum internum requirunt, quem conjunctum cum priore actu externo sufficere putant ad pariendam obligationem. Alii, quibus id displicet, ideo quia actus externus non potest signum esse actus interni sequentis, requirunt novam verbis factam promissionem et acceptationem. Verior est media sententia, actum quidem externum requiri, sed non utique verbis factum, cum retentio rei promissæ ex parte ejus cui promissa est, et relictio ejus ex parte promittentis, aut simile aliquid, sufficere possint ad significandum consensum.

Navar. c. 22. n. 51. et 80. Lib. iii.

Sanc. l. ii. *de Mat. Disp.* 32. n. 8.

XXI. Hoc quoque omittendum non est, ne jura civilia

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long as it is not accepted by that third party: although there are not wanting, in this as in other questions, those who think otherwise. But to a person who looks rightly at the matter the natural equity will appear evident, so that it will not need many proofs.

XX. This also is often disputed, how a promise founded in error can recover its force, if the promiser wishes to stand by his promise. And the same question may be asked concerning promises, which are void by the Civil Law on account of fear or other causes, if the cause afterwards have ceased. For to confirm these, they require only an internal act, which, conjoined with the former external act, they think suffices to produce an obligation. Others, not satisfied with this, because an external act cannot be a sign of a *subsequent* internal act, require a new promise expressed and accepted. The middle opinion is the true one: that an external act is required, but not expressed in words, when the retention of the thing promised by the promisee, and its relinquishment on the part of the promiser, or any similar event, may suffice to signify consent.

XXI. This also is not to be omitted, in order that Civil Law and Natural Law may not be confounded; that promises which have no cause expressed, are not void by Natural Law, any more than donations of property.

cum naturali jure confundantur, neque promissiones quæ causam expressam non habent, naturaliter esse irritas, non magis quam rerum donationes.

XXII. Neque eum qui factum alienum promisit ad id quod interest teneri, modo facere non omiserit quod ex sua parte ad id factum obtinendum facere poterat; nisi verba aut negotii natura obligationem inducant strictiorem. *Velut persoluta fide,* inquit Livius, [t] *quia per eum non stetisset quin præstaretur.* Covar. c. *Quam.* p. 2. § 5. Lib. ii. 32.

[t] *Quia per eum non stetisset quin præstaretur*] Confer quæ infra Lib. III. c. xxi. § 30.

XXII. Also that he who has promised an act on the part of another, is not bound to the extent of the interest of the promisee, provided he has not omitted to do what he could on his own part, to obtain the doing of the thing promised; except there be words, or the nature of the business, such as to induce a stricter obligation. *As if he had performed his engagement,* says Livy, *because it did not depend on him that it was not performed.*

CAPUT XII.

DE CONTRACTIBUS.

I. *Divisio actuum humanorum qui aliis hominibus utiles sunt: ac primum in simplices ac mixtos.*
II. *Simplicium, in beneficos meros, aut cum mutua obligatione:*
III. *Et permutatorios: tum qui dirimunt,*
IV. *Tum qui communionem adferunt,*
V. *Mixtos esse principaliter,*
VI. *Aut per accessionem.*
VII. *Qui actuum contractus dicantur.*
VIII. *Æqualitatem in contractibus requiri: Primum, circa actus præcedaneos.*
IX. *Ad scientiam:*
X. *Ad libertatem volendi.*
XI. *Secundo, in ipso actu, si sit permutatorius.*
XII. *Tertio, in eo, de quo agitur: quod explicatur.*
XIII. *Quæ æqualitas locum habeat in actibus mere aut partim beneficis.*
XIV. *Quomodo æstimandum rei pretium in venditione: et ex quibus causis juste crescat aut minuatur.*
XV. *Quando naturaliter perfecta sit venditio: et quando dominium transeat.*
XVI. *Monopolia quæ sint contra jus naturæ, aut diligendi legem.*
XVII. *Pecunia functionem quomodo recipiat.*
XVIII. *De conductionis mercede naturaliter nihil remittendum ob sterilitatem et similes casus: et quid si conductore primo impedito uti, res alii locata sit?*
XIX. *Justa merces quomodo crescat aut minuatur.*
XX. *Quo jure vetitæ sint usuræ.*
XXI. *Quæ commoda usuræ nomine non veniant.*
XXII. *Legum civilium quæ circa hanc rem vis sit.*
XXIII. *Qualis æstimatio facienda in contractu aversi periculi, sive assecurationis.*
XXIV. *Qualis in societate, ubi multæ ejus species explicantur.*
XXV. *De societate navali.*
XXVI. *Jure gentium inæqualitatem, in quam consensum est, quoad actus exteriores non attendi: et quo sensu id naturale dicatur.*

I. ACTUUM humanorum, qui ad aliorum hominum utilitatem tendunt, alii sunt simplices, alii compositi.

II. [a] Simplices alii benefici, alii permutatorii. Benefici

[a] *Simplices alii benefici, alii permutatorii*] Aristoteles illa omnia δόσεως, hæc πράσεως nomine comprehendit. [Locus est *Rhetor.* Lib. I. c. 5. p. 523 B.

Chapter XII. *Of Contracts.*

I. Of human acts which tend to the utility of others, some are simple, some are compound.

aut meri, aut cum mutua quadam obligatione. Benefici meri, aut in præsens absolvuntur, aut in futurum prominent. In præsens absolvitur factum utile, de quo nihil loqui necesse est, quando utilitatem quidem parit, sed nullum juris effectum: item donatio, qua dominium transfertur, qua de re egimus supra cum de dominii acquisitionibus ageretur. In futurum prominent promissiones tum dandi, tum faciendi, de quibus jamjam egimus. Benefici actus cum obligatione mutua sunt, qui aut de re disponunt sine alienatione, aut de facto ita ut aliquis effectus supersit. Talis est circa rem usus concessio, qui commodatio dicitur: in factis præstatio operæ sumtuosæ, aut obligatoriæ, quæ dicitur mandatum, cujus species est depositum, præstatio scilicet operæ in re custodienda. His autem actibus similes sunt actuum promissiones, nisi quod, ut diximus, hæ in futurum prominent: quod et de actibus jam explicandis intellectum volumus.

III. 1 Actus permutatorii aut dirimunt partes, aut communionem adferunt. Actus eos qui diremtorii sunt, recte di-

Tom. II. *Edit. Paris.* Sed agitur ibi de Alienatione, Ἀπαλλοτρίωσις, non autem de omnibus Contractibus. *J. B.*]

II. Of simple acts, some are gratuitously *beneficial*, others are of the nature of exchange of one act for another, *permutatorial*. Beneficial acts are either merely so, or with some mutual obligation. Mere beneficial acts are either discharged in the present time, or stand over for the future. A useful good office is performed in the present time, and of this it is not necessary to speak, since it produces advantage indeed by the recipient, but no effect as of right: so also a donation, by which ownership is transferred, of which we treated above, when we spoke of acquisitions of ownership. As acts standing over for the future, we reckon promises both of giving and of doing; concerning which we have already spoken.

Beneficial acts with a mutual obligation, are those which dispose of any thing without alienation, or so dispose of an act that some effect survives. Such is a concession of the use of a thing, which is called a Loan; and of acts, the undertaking of an office expensive or obligatory, which we may call a Commission; of which kind is a Deposit, namely, the office of keeping a thing in custody. Similar to these acts are the promises of acts, except that, as we have said, these stand over for the future; which also we desire to have understood of the acts now to be explained.

III. 1 Permutatorial acts either separate the parties or produce a community between them. Those acts which separate, *diremtorial*

vidunt jurisconsulti Romani in do ut des, facio ut facias, facio ut des: de quibus videri potest Paulus jurisconsultus in l. *Naturalis:* Digestis, *Præscriptis verbis.* Leg. 5. princ.

2 Sed Romani ab hac divisione eximunt quosdam contractus, quos ipsi nominatos vocant, non tam quod proprium habeant nomen (habet enim hoc et permutatio, quam a nominatorum numero excludunt) quam quod ob usum frequentiorem [b] vim quamdam et naturam accepissent talem, quæ etiamsi nihil esset dictum specialiter, ex ipso nomine satis posset intelligi: unde etiam certæ de illis proditæ erant actionum formulæ: cum in cæteris contractibus minus frequentibus hoc tantum inesset, quod dictum erat, ac proinde non communis aliqua et usitata, sed accommodata ad ipsum factum daretur formula, quæ ideo præscriptis verbis dicebatur. Ob eandem causam usus frequentioris in conventionibus nominatis, si requi-

[b] *Vim quandam et naturam accepissent talem*] Vide Vasq. Lib. I. controv. c. x. in fine.

[c] *Si de pretio convenisset*] Apud Hebræos perfecta non censetur venditio, ante traditionem veram vel imaginariam. [Vide SELDEN. *De Jure Nat. et Gent. Secund. discip. Hebr.* Lib. VI. c. 5.]

[d] *Simplicior est et antiquior*] Apparet id ex Homeri versibus productis Lib. I. D. *de Contrahenda Emtione.* Tacitus *de Germania,* (*Germ.* c. 5): *Interiores simplicius et antiquius permutatione mercium utuntur.* Servius, *ad Eclogam* IV. ad illud (vers. 39): *Mutabunt merces: quia antiqui res rebus mutabant.* Et ad illud *Georg.* III. (vers. 307): *Vellera mutentur: ingenti pretio comparentur. Nam apud majores omne mercimonium permutatione constabat, quod et Caius Homerico confirmavit exemplo.* Plinius, libro XXXIII. c. 1:

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acts, the Roman jurists rightly divide into these: *do ut des: facio ut facias: facio ut des.* See Paulus and the Digests. [Dig. xix. 5.]

2 But the Romans except from this division certain contracts which they call *nominate* contracts*; not so much because they have proper names, (for *permutation* or exchange, which they exclude from nominate contracts, has also a proper name,) as because, from their more frequent use, they have received a certain force and nature, which may be sufficiently understood by the name, although nothing be said specially. Whence also with regard to them there were certain established formulæ of actions. While in other contracts, which are less frequent, that only was implied which was expressed; and therefore there was not any common and usual form of action, but a form accommodated to the fact, which was therefore called a form *in prescript words.*

For the same reason, of a more frequent use in the nominate contracts, if certain requisites were present, the necessity of fulfilling

* See *E. M.* 708, &c.

sita quædam adessent, ut in venditione [c]si de pretio convenisset, etiam re integra, id est antequam a partium altera præstitum esset aliquid, injungebatur implendi necessitas: cum in illis rarioribus re integra daretur pœnitendi libertas, id est impunitas, quia lex civilis vim coactricem subtrahebat illis conventionibus, ut sola contrahentium fide starent.

3 At jus naturæ ignorat hæc discrimina: neque vero qui innominati ab illis dicuntur contractus, aut minus sunt naturales, aut minus antiqui: imo permutatio, quæ innominatis accensetur, emtione et [d]simplicior est et antiquior. Et Eustathius ad Iliados x. ubi de certamine publico agitur, cui præ- v. 160.
mium constitutum est, quod apud Homerum est ἄρνυσθαι, interpretatur ἀντικαταλλάττεσθαι, addens συνάλλαγμα γάρ τι καὶ τὰ τοιαῦτα· nimirum facio ut des. Nos ergo naturam sequentes, contractus omnes diremtorios, nullo nomi-

Quantum feliciore ævo, cum res ipsæ permutabantur inter se, sicut et Trojanis temporibus factitatum Homero credi convenit. Libro sexto, cap. XXII. *de Seribus: Fluminis ulteriore ripa merces propositas juxta venalia tolli ab his si placeat permutatio.* Mela de iisdem (Lib. III. c. 7. n. 10. *Ed. Voss.*): *Seres intersunt, genus plenum justitiæ ex commercio, quod rebus in solitudine relictis absens peragit.* De iisdem Ammianus, libro XXIII. (Cap. VI. p. 413. *Ed. Vales. Gron.*): *Cum ad coëmenda fila vel quædam alia fluvium transierunt advenæ, nulla sermonum vice, propositarum rerum pretia solis oculis æstimantur.* Mela de Sarmatis, [Immo *de Satarchis*, II. I. 95]: *Vice rerum commercia exercent.* De Colchis vide Busbequium *Epistola Exoticarum* III. (Pag. 205. *Ed. Elzev.* 1660.) de Lapponibus, Olaum Magnum, libro IV. c. 5.

the contract was held as the rule; as in *sale* if the price had been agreed upon, the contract was good, even *re integrâ*, that is, though nothing had been performed on either side: while in the rarer contracts, *re integrâ*, there was allowed the liberty of retracting, that is, impunity, because the Civil Law withheld coactive force from those contracts, leaving them to stand on the good faith of the contracting parties only.

3 Natural Law does not recognize these distinctions: for the contracts which are called by men *innominate*, are neither less natural nor less ancient than the nominate. Nay Exchange, which is reckoned among the innominate, is both older and simpler than buying. Eustathius, where in the *Iliad* (B. x.) a public contest is mentioned with a prize appointed, which in Homer is said to be *earned*, interprets it, *taken in exchange*, adding, *for it is a sort of contract;* namely, *facio ut des*, I work that you may pay. We therefore, following nature, shall refer all diremtory contracts to the three kinds which we have mentioned, making no distinction of nominate and innominate.

natorum aut innominatorum discrimine, ad tria quæ diximus genera revocabimus.

4 Dicemus proinde dari ut detur, statim quidem rem pro re, ut in ea, quæ specialiter dicitur permutatio, antiquissimum haud dubie commercii genus: aut [e]pecuniam pro pecunia, quod collybum Græci vocant, mercatores hodie cambium: aut rem pro pecunia, ut in emptione ac venditione: aut usum rei pro re: aut usum rei pro usu rei: aut usum rei pro pecunia, quod postremum locatio conductio dicitur. Usus autem nomine hic intelligimus tum nudum usum, tum eum qui cum fructu conjunctus est, sive is sit temporarius, sive personalis, sive hereditarius, sive alio quovis modo circumscriptus, ut apud Hebræos is qui durabat ad annum Jubilæum. Datur vero, ut interposito tempore tantundem, et genere idem detur, in mutuo, quod locum habet in his, quæ pondere, numero, mensura constant, tam rebus aliis, quam pecunia.

Arist. *Eth.* v. 8. 1. *Pol.* 9. *D. de Cont. Emt.* l. 1.

5 Facti cum facto permutatio innumeras habere potest species pro factorum diversitate. At facio ut des, aut pecuniam; (atque id quoque in factis quotidianæ utilitatis locatio conductio dicitur, in facto præstandæ indemnitatis circa casus

[e] *Pecuniam pro pecunia*] De eo vide Procopium *Arcana Historia.* (cap. 25). Nummus Illyrico advectus quondam in Italia mercis loco. Plinius libro XXXIII. c. 3.

[1] Verius est, heic esse meram Em-

4 Hence we shall say that *do ut des, I give that you may give,* either one thing for another, which is specially called Permutation or Exchange, and is doubtless the oldest kind of commerce: or money for money, to which the merchants give the technical name of *Exchange:* (*Cambium:*) or a thing for money, as in Buying and Selling: or the use of a thing for a thing; or the use of a thing for the use of a thing: or the use of a thing for money, which is Letting and Hiring. By *use,* we here mean both the naked use, and that which is combined with the enjoyment of the produce, whether temporary, or personal, or hereditary, or circumscribed in any other way; as that which among the Hebrews continued to the year of the Jubilee. In a Loan, the thing is given, in order that after the lapse of a certain time, the same in quantity and kind may be returned, of things which are estimated in weight, measure, and number, both other things and money.

5 The exchange of act for act may have innumerable kinds according to the diversity of the acts. But *facio ut des,* is, *I act that you may give,* either money, (and this includes Letting and Hiring, and Assurance against risk, a contract formerly hardly

fortuitos aversio periculi, vulgo assecuratio, qui contractus olim vix cognitus nunc est inter receptissimos;) aut ut des rem, aut usum rei.

IV. Actus autem communicatorii aut facta communicant, aut res, aut hinc res, inde facta ad utilitatem communem, quæ omnia veniunt societatis nomine: in quo genere comprehenditur et bellica societas, qualis illa apud nos frequens navium privatarum coitio adversus piratas, aut alios invasores, quam vulgo Admiralitatem nuncupant, Græci σύμπλοιαν aut ὁμόπλοιαν vocabant.

V. Mixti autem actus sunt, aut principaliter, aut per accessionem alterius. Sic si sciens rem majoris emam, et quod plus est in pretio alteri condonem, partim donatio erit, partim emtio: si fabro pecuniam promittam, ut de suo auro mihi [1] annulos faciat, partim emtio erit, partim conductio. Sic et in societate accidit, ut alter factum et pecuniam, alter pecuniam tantum contribuat. Et in feudali contractu rei feudalis concessio beneficium est, pactio autem militaris operæ pro tutela, est facio ut facias. Quod si onus pensionis accedat, eatenus miscetur cum emphyteusi. Fœnus quoque nauticum mixtum quid est ex contractu mutui, et periculi aversi.

tionem venditionem: quæ sententia tandem prævaluit apud JCtos veteres. Vide § 4. *Inst. De Locat. Conduct.* *J. B.*

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known, now among the most common,) or that you may give a thing, or the use of a thing.

IV. Acts communicatory, either establish a community of acts, or of property, or property on the one side, acts on the other for the common utility; all which are called Partnership. In which class are included associations for the mutual Protection of ships in time of war, against pirates or other enemies, which is called *an Admiralty*.

V. Acts are mixed (or compound, § 1) either as principal, or by the accession of another act. [First as principal.] Thus if I knowingly buy a thing for more than it is worth, and give the seller the excess of price, it is partly buying, partly donation. If I promise money to a goldsmith for making rings for me of his own gold, it is partly buying (of material), partly hire (of labour). So in Partnerships it happens that one person contributes acts and money, another money only. And in the Feudal Contract, the concession of the fief is a benefice, but the pact of military service for protection is *facio ut facias*. And if the fief be burthened with an annual pay-

VI. Per accessionem ad alterum actum fit mixtio, ut in fidejussione et pignoris datione. [2]Nam fidejussio, si negotium spectes quod inter fidejussorem et principalem debitorem geritur, plerumque mandatum est: sin negotium quod inter creditorem et fidejussorem, qui nihil recipit, geritur, videtur actus mere liberalis: sed quia contractibus onerosis accedit, inde censeri solet. Pignoris quoque datio per se videtur actus liberalis, qua detentio rei conceditur: sed hæc quoque naturam trahit ex contractu, cui securitatem præstat.

VII. Omnes autem actus aliis utiles, extra mere beneficos, contractuum nomine appellantur.

L. Lab. 19. D. de Verb. Signif.

VIII. In contractibus natura æqualitatem imperat, et ita quidem, ut ex inæqualitate jus oriatur minus habenti. [3]Hæc æqualitas partim consistit in actibus, partim in eo de quo agitur, et in actibus, tum præcedaneis, tum principalibus.

IX. 1 Ad præcedaneos actus pertinet, quod is qui cum aliquo contrahit [f]vitia sibi nota rei de qua agitur significare debet: quod non civilibus tantum legibus constitui solet, sed naturæ quoque actus congruit. Nam inter contrahentes pro-

L. 1. D. de Act. Emt. et Vend.

[2] Nulla est heic vera mixtio actuum. Vide Pufendorf. *De Jure Nat. et Gent.* Lib. v. cap. 2. § 10. *J. B.*

[3] Confer, in toto isto argumento, eumdem Pufendorf. Lib. v. cap. 3. *J. B.*

[f] *Vitia sibi nota*] Vide Scholiasten ad illud Horatii (ii. *Sat.* iii. 285):

mentem nisi litigiosus
Exciperet dominus.

ment, it is, so far, a letting for a money-rent. So money lent to shipowners is partly a Loan and partly Insurance.

VI. Acts are mixed by the accession of another act, as in giving security, and in pledge. For suretiship, if you regard the business which takes place between the surety-giver and the principal debtor, is for the most part a commission: if you regard the business between the creditor and the surety-giver, who receives nothing, it is an act merely liberal: but because this liberal act is added to an onerose contract, it is reckoned with such contracts. So the giving of a pledge seems to be a liberal act, by which the detention of a thing is conceded; but this also takes its nature from the contract which is thus supplied with a security.

VII. All acts useful to others, with the exception of merely beneficial acts, are called Contracts.

VIII. In Contracts, nature requires equality, and in such a way that, from inequality, he who has the worse share, acquires a right. This equality consists partly in the act, partly in the matter concerning which the act is, and in the acts both precedent and principal.

IX. 1 It belongs to the preceding acts, that he who makes a

pior quædam est societas quam quæ communis est hominum. Atque hoc modo solvitur quod dicebat Diogenes Babylonius hoc tractans argumentum, non celari omnia quæ tacentur: nec quidquid tibi audire utile est idem mihi dicere necesse esse, ut de rebus cœlestibus, nam [g]contractus natura utilitatis causa reperta propius quiddam exigit. Bene Ambrosius: *In contractibus etiam vitia eorum quæ veneunt prodi jubentur, ac nisi intimaverit venditor, quamvis in jus emtoris transcripserit, doli actione vacuantur.* Lactantius dixerat: *Qui vendentis errorem non redarguit, ut aurum parvo emat, aut qui non profitetur fugitivum servum, vel pestilentem se domum vendere, lucro et commodo suo consulens, non est ille sapiens, ut Carneades videri volebat, sed callidus et astutus.*

Cic. *de Offic.* iii. 12.

Offic. iii. 10

Lib. v. 17.

2 At non idem dicendum est de his quæ rem non contingunt: ut si quis sciat multas naves in cursu esse quæ frumentum advehunt: nam tale quid indicare est quidem officiosum ac laudabile, sæpe adeo ut omitti nequeat, nisi caritatis regula violetur; non tamen injustum, id est, non pugnans cum jure ejus, quicum negotium est: ita ut locum hic habere possit

Thom. 2. 2. 77. art. 3. Bal. *ad l.* 1. *de Ædil. ed.* Covar. *ad c. Pec.* p. 2. § 4. n. 6. *d. loco.*

[g] *Contractus natura utilitatis causa reperta propius quiddam exigit*] Valerius Maximus Lib. VIII. c. ii. n. 1. *bonæ fidei venditorem, nec commodorum spem augere, nec incommodorum cognitionem obscurare oportet.* Agitur ibi de ædibus dirui jussis ab auguribus, quod emtorem venditor celaverat.

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contract about any thing, ought to make known the faults of the thing so far as he knows them, which is not only the usual rule of Civil Laws, but also agreeable to the nature of the act. For between the contracting parties, there is a connexion closer than the common society of mankind. And in this way we answer the argument of Diogenes of Babylon on this subject, who says that all that is untold is not therefore concealed: and that it is not necessary for me to say all that it is useful for you to hear: thus I need not tell you how the heavens move. For the nature of Contract, having for its object common utility, requires some closer union. So Ambrose and Lactantius. [See.]

2 The same does not apply to circumstances which do not affect the thing itself: as if any one know that there are many ships on their way bringing corn. To tell this is kind and laudable; often so far, that it cannot be omitted without violating the rule of charity: but the omission is not unjust; that is, it is not repugnant to the right of him with whom I deal: so that here that may hold which the same Diogenes said, as Cicero reports*, *I bring my wares to market: I offer*

* See *E. M.* 716.

illud, quod idem ille Diogenes non incommode dicebat, referente M. Tullio: *Adverxi, exposui: vendo meum, non pluris quam ceteri: fortasse etiam minoris cum major est copia:* Cap. 13. *ibid.* *cui fit injuria?* Non ergo generaliter sequendum illud ejusdem Ciceronis, celare esse, cum tu quod scias, id ignorare emolumenti tui causa velis eos quorum intersit scire: sed tum demum id locum habet, cum de iis agitur quæ rem subjectam per se contingunt, ut si domus sit pestilens, si a magistratu dejici jussa, quæ exempla ibidem videas.

3 At vitia ei quicum agas nota, ut servitutem ædium quas M. Marius Gratidianus C. Sergio Oratæ vendebat ab ipso *D. l. 1. D. de Act. Emt. et Vend. in fin.* prius emtas, dici nihil attinet: [h]scientia enim utrinque par pares facit contrahentes. Horatius (II. *Epist.* II. 13):

> Ille feret pretium pœnæ securus, opinor:
> Prudens emisti vitiosum.

p. 916. Tom. II. Quod notatum et Platoni undecimo *de Legibus*.

X. Neque vero tantum in intellectu rerum, sed et in voluntatis usu quædam contrahentibus inter se æqualitas debetur: non quidem ut si quis antecessit metus juste incussus, is demi debeat; id enim contractui extrinsecum est: sed nequis

[h] *Scientia utrinque par, pares facit contrahentes*] Edictum Theuderici, c. 141.

[4] Addidi vocem *injuste,* quæ in omnibus Edd. manifesto deest, ut patet ex serie orationis, et oppositione τοῦ *metus juste incussus.* Vocabulum, ob similitudinem sequentis *incutiatur,* a Typogra-

them for sale: I sell what is my own: not dearer than others; perhaps cheaper, as I have a larger stock. Whom do I wrong? Therefore we are not in general to follow the rule which Cicero lays down, that it is concealment, if those whose interest it is to know anything, you would have ignorant of it for the sake of your gain. That holds with regard only to points which affect the thing itself: as if a house which is to be sold is unhealthy; if it has been ordered by the magistrate to be pulled down: where see the examples which he gives.

3 The faults which are known to the person with whom you deal, need not be mentioned; as the *servitude* to which the house was subject which Gratidianus sold to Oratas, having bought it of him before: for both parties, having equal knowledge, are on an equality. So Horace; Plato.

X. Nor is it only in the understanding with respect to the matter, but also in the use of the will, that there ought to be a certain equality between the contracting parties: not indeed that if there have gone before any fear justly impressed, that must be removed, for that is extrinsic to the contract: but that no fear is to be un-

injuste [4]incutiatur contrahendi causa, aut si incussus est, ut dematur. Hoc spectantes Lacedæmonii resciderunt emtionem agri, quam Elei possessoribus metu expresserant, γνόντες μηδὲν δικαιότερον εἶναι, βίᾳ πριαμένους ἢ βίᾳ ἀφελομένους, παρὰ τῶν ἡττόνων λαμβάνειν· *Arbitrati nihilo justius esse, infirmioribus per emtionis titulum, quam vi mera rem extorquere,* quæ Xenophontis verba sunt. Quod tamen quam exceptionem ex jure gentium habeat, suo loco videbimus. *Hist. Gr.* iii. 2. § 22.

XI. 1 In ipso actu principali hæc desideratur æqualitas, ne plus exigatur quam par est. Quod in contractibus beneficis locum vix potest habere. Nam si quis pro commodato, aut opera in mandato aut deposito exhibenda, aliquid mercedulæ stipuletur, non injuriam faciet, sed contractum miscebit, id est ex gratuito efficiet semipermutatorium. At in permutatoriis omnibus sollicite id observandum est: nec est quod dicat quispiam, id quod pars altera amplius promittit, donatum censeri. Neque enim solet hic esse tales contractus ineuntium animus, nec præsumendus est nisi appareat. Quod enim promittunt aut dant, credendi sunt promittere aut dare tanquam æquale ei quod accepturi sunt, utque ejus æqualitatis ratione debitum. *Inst. de Mand.* § *ult.* *L.* 1. § *Si quis Serv.* 9. *D. Depos.*

phis omissum, non animadvertit Auctor ipse; unde nil mirum si fugerit Editores. Contrarium τὸ *juste* alibi omissum, simili incuria, videbimus, cap. xx. hujus Libri, § 40. sub finem. *J. B.*

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justly impressed with a view to the contract; or if it be impressed, that it be put away. Looking at this rule, the Lacedæmonians rescinded the purchase of the land which the Thebans had extorted from the possessors by fear. See Xenophon. What exception there is to this in the Law of Nations, we shall see in its own place.

XI. 1 In the principal act of a contract this equality is required, that more be not demanded than is equitable. Which, in beneficial contracts, can hardly have place. For if any one demands some payment for a loan, or for executing a commission, or keeping a deposit, he does no wrong, but he alters the nature of the contract, and makes it, from being gratuitous, become semipermutatory. But in all permutatory contracts this is carefully to be observed. Nor is it enough for any one to say that what the other party has promised more than equality, is to be regarded as a donation. For such is not the intention of contracting parties, and is not to be presumed so, except it appear. For what they promise or give, they are to be supposed to promise or give as equivalent to what they are to receive, and as what is done on the ground of such equivalence.

In Joan. Hom. lx. Tom. ii. p. 809. 2 Joh. Chrysostomus: ὅταν γὰρ ἐν τοῖς συμβολαίοις καὶ ἡνίκα δ' ἂν ἀγοράσαι δέῃ τι ἢ καὶ ἀποδόσθαι, φιλονεικῶμεν καὶ βιαζώμεθα ἔλαττον τῆς ἀξίας καταλαβεῖν καὶ πάντα ὑπὲρ τούτου ποιῶμεν, οὐ λῃστεία τὸ πρᾶγμα ἐστίν· *Quoties enim in contractibus, et quoties emendum quid aut dependendum est, contendimus, omnique modo laboramus ut minus æquo pretio demus;* [5] *nonne huic facto quoddam inest furtum?* p. 1043. Scriptor vitæ Isidori apud Photium, Hermiam narrat, ubi quod emere vellet justo forte minoris esset indicatum, adjecisse quod justo pretio deerat, quod existimaret aliter agere injustitiæ esse speciem, sed talis quæ plurimos lateret. Et in hunc sensum interpretantur Hebræi legem, quæ est [i] Levit. xxv. 14 et 17.

XII. 1 Restat æqualitas in eo de quo agitur, in hoc consistens, ut etiamsi nec celatum quicquam sit quod dictum oportuit, nec plus exactum quam deberi putabatur, si in re tamen deprehendatur inæqualitas, quamquam sine culpa partium, puta quod vitium latebat, aut de pretio errabatur, ea quoque sit resarcienda, et demendum ei qui plus habet, reddendumque minus habenti: quia in contractu id utrimque propositum aut fuit, aut esse debuit, ut uterque tantundem haberent.

[5] Sententiam istam, ut nimis rigidam, improbat, simulque ab Auctore nostro male λῃστείαν verti *furtum*, quæ vox significat *latrocinium*, adeoque durior, obiter observavit v. Cl. ANT. SCHULTINGIUS, Sermon. Academic. *De angusta innocentia Hominis ad Legem boni*, pag. 38.

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2 Authorities of Chrysostom, Hermias, Levit. xxv. 14 and 17.

XII. 1 There remains to be considered, equality in the thing itself, consisting in this, that though nothing was concealed which ought to have been told, nor more exacted than was thought to be due; yet if there be an inequality in the thing itself, though without any fault of the parties; if for instance there was some latent defect, or some error about the price, that also is to be made good, and the difference paid to him who suffers by it; because, in a contract, there was intended, or ought to have been, that each party should have the same value.

2 The Roman law appointed this as the rule, not in every inequality, (for the law does not follow matters to their smallest dimensions, and also wishes to obviate the multitude of lawsuits,) but in a grave inequality, as for instance, one which exceeds the half of the fair price. In fact, laws, as Cicero says, remove what is not equitable, in cases when you can take hold of it with your hand; the philosophers, so

2 Lex Romana hoc constituit non in quavis inæqualitate, minima enim non persequitur, imo et occurrendum censet multitudini litium, sed in satis gravi, ut quæ dimidium justi pretii excedit. Nimirum leges, ut ait Cicero, iniqua tollunt quatenus teneri manu possunt, philosophi quatenus ratione et intelligentia. Hi vero qui legibus civilibus subjecti non sunt, id sequi debent quod æquum esse ipsis ratio recta dictat: imo et illi qui legibus subjecti sunt, quoties de eo quod fas piumque est agitur, si modo leges non jus dant aut tollunt, sed juri duntaxat ob certas causas auxilium suum denegant. *D. loco.*

XIII. 1 Sed notandum est, quandam rei æqualitatem spectari et in contractibus beneficis, non quidem omnimodam ut in commutatoriis, sed ex suppositione ejus quod agitur, ne quis scilicet ex beneficio damnum sentiat: ob quam rationem mandatarius indemnis præstari debet a sumtibus factis, et damno in quod ex causa rei mandatæ incidit: et commodatarius rem tenetur resarcire si periit, quia non solius rei ratione domino tenetur, id est, ex vi dominii, quomodo quivis possessor teneretur, ut supra didicimus, sed et ratione beneficæ acceptionis: [k] quod ita verum est, nisi omnino et apud dominum fuisset peritura. Hoc enim casu nihil per commodatum domino abest. Contra depositarius præter fidelitatem nihil

Sylvest. *in Verb. Bell.* p. 1. n. 7. Thom. 2. 2. 61. art. 6.

[i] *Levitici* XXV. 14, 17.] Vide *Mosem de Kotzi*, præcepto jubente LXXXII.

[k] *Quod ita verum est, nisi omnino et apud dominum fuisset periturum*] Lex Wisigotthorum Lib V. tit. v. c. 1, 2, 3.

far as you can grasp it by reason and intelligence. But those who are not subject to Civil Laws ought to follow that which right reason dictates to them as equitable; and even those who are subject to laws, whenever the question is what is right and pious; since the laws do not create or destroy right, but only deny their support to some rights for certain causes.

XIII. 1 It is to be noted that a certain equality of matter is to be regarded even in beneficial contracts; not a complete equality, as in commutatorial, but one according to the nature of the transaction: so that a person may not be damaged by a benefit which he bestows: for which reason a commissioner or agent is to be indemnified for the expense and loss which he incurs by his agency: and a *loanee* is bound to make good the thing lent if it be destroyed; because he is bound to the owner, not in respect to the thing alone, that is, by virtue of ownership, as any possessor of it would be bound, (as above said,) but also in virtue of the benefit received: which holds true, except the thing would have perished also, if it had remained with

recepit: ideo si periit res, non tenebitur: non rei ratione, quia non exstat, nec locupletior est; nec acceptionis ratione, quia accipiendo beneficium non accepit, sed dedit. In pignore, ut et in locato, media via sequenda est, ut qui rem accepit nec de casu quovis teneatur ut commodatarius, et majorem tamen diligentiam quam depositarius præstare debeat: quia pignoris acceptio est quidem gratuita, sed accedere solet contractui oneroso.

2 Quæ omnia Romanis quidem congruunt legibus, sed non ex illis primitus, sed ex æquitate naturali veniunt. Quare eadem apud alias quoque gentes reperire est. Inter ceteros apud Hebræum Mosem Maimonidem libro III. ductoris dubi-
vii. *de Benef.* 19. tantium [l]cap. 43. Spectavit huc Seneca cum dixit, *alios fidem debere, alios tutelam.* Ad hanc vero formam de cæteris quoque contractibus judicium est faciendum. Sed generali tractatione quantum instituto nostro sufficit absoluta, speciales quasdam contractuum quæstiones percurramus.

[l] *Capite* 43] Convenit cum Exodi loco cap. xxii. 7, 10, 11, 12, 13. Moses de Kotzi præceptis jubentibus LXXXVIII. et LXXXIX.

[6] Vide de iis omnibus, quæ ad *pretii* naturam et varia genera pertinent, PUFENDORFIUM *De Jure Nat. et Gent.* Lib. V. cap. i. cum Notis nostris, alterius Editionis. *J. B.*

[m] *Pretia luxuria fecit.*] Idem libro XXXVII. *de Gemmis* (c. 6): *Singulorum libido singulis modum facit et maxime regum.* Et libro XXXII. *Quantum apud nos Indicis margaritis pretium est, tantum apud Indos in coralio: namque ista persuasione gentium constant* (c. 2). Augustinus *de Civitate Dei* libro XI. cap. 16. *Sed quid mirum, cum in ipsorum*

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the owner. For in this case, the owner loses nothing by the loan. On the other hand, a depositary receives nothing but a reliance on his good faith: therefore if the thing perish he is not bound; not by reason of the thing, for it no longer exists, and he is no better off for it; nor by reason of his having accepted it, for by accepting it, he bestowed, not received, a benefit. In a pledge, and in a thing hired, a middle way is to be followed: so that he who has accepted the thing is not bound to make it good like a loanee, and yet is bound to use more diligence than a depositary: because the acceptance of a pledge is gratuitous indeed, but is usually an accompaniment of an onerose contract.

2 All which rules agree indeed with the Roman Laws, but appear not to come originally from them, but from natural equity. And hence the same rules are to be found also among other nations. So Maimonides, [l]Seneca. And according to these principles we must judge also of other contracts. But having finished the general discussion so far as our purpose requires it, let us run over certain special questions of contracts.

XIV. 1 Mensura ejus [l]quod res quæque valeat maxime naturalis est indigentia, ut Aristoteles recte ostendit: quod in permutationibus rerum apud barbaros populos maxime spectatur. Non tamen hæc unica est mensura. Nam hominum voluntas, quæ rerum domina est, multas res magis desiderat quam sunt necessariæ. *Margaritis*, inquit Plinius, [m]*pretia luxuria fecit.* Et Cicero Verrina de signis: *Qui modus est in his rebus cupiditatis, idem est æstimationis.* Et contra evenit ut res maxime necessariæ minoris sint propter copiam. Quod Seneca multis exemplis ostendit libro *de Beneficiis* VI. cap. 15, ubi et hoc addit: *Pretium cujusque rei pro tempore est: cum bene ista laudaveris, tanti sunt quanto pluris venire non possunt.* Paulus jurisconsultus: *Pretia rerum non ex affectu, nec utilitate singulorum, sed* [n]*communiter funguntur;* id est, ut alibi explicat, *quanti omnibus valeret.* Hinc fit ut res tanti æstimetur, quantum pro ea communiter offerri aut dari solet, quod vix est ut non aliquam latitudinem habeat, intra quam plus minusve dari aut exigi possit, nisi

Mor. Nic. v. 8.

Hist. Nat. xx. 35.

In Verr. iv. 7.

L. 63. D. *ad l. Falc.*

L. 33. D. *ad Leg. Aquil.*

etiam hominum æstimatione, quorum certe natura tantæ est dignitatis, plerumque carius comparetur equus quam servus, gemma quam famula? ita in tali libertate judicandi plurimum distat ratio considerantis a necessitate indigentis, seu voluptate cupientis, cum ista quid per se ipsum in rerum gradibus pendat, necessitas autem quid propter quid expetat, cogitet; et ista quid verum luci mentis appareat, voluptas vero quid jucundum corporis sensibus blandiatur, exquirat.

[n] *Communiter funguntur*] Plin. Lib. XVIII. c. 31. *Æqui patrisfamilias modus est, annona cujusque anni uti.*

XIV. 1 The most natural measure of the value of any thing is the need for it, as Aristotle rightly shews: which is seen most clearly in the exchange of things amongst barbarians. Yet this is not the only measure. For the will of men, which is the master of things, desires many things more than are necessary. *Pearls,* says Pliny, *derive their value from luxury.* And so Cicero of pictures: *the measure of man's desires in these things is the measure of value.* And, on the other hand, it comes to pass that the most necessary things are of small value for their abundance. So Seneca shews by many examples, and adds, *The price of any thing is a temporary accident: however much good you may say of them, they are worth just so much as they will fetch when sold.* So Paulus, *The prices of things are not from the opinion or utility of individuals, but are a common function;* that is, as he explains elsewhere, *what they would be worth to people in general.* Hence it comes to pass that a thing is supposed to be of such value as is given or offered for it commonly; which cannot help having a certain latitude, within which more or less may be given or

ubi lex certum rebus pretium ἐν στιγμῇ, ut Aristoteles loquitur, id est, *in puncto* constituit.

2 In communi autem illo pretio [o]ratio haberi solet laborum et expensarum, quas mercatores faciunt: soletque subito quoque mutari ex copia et inopia ementium, pecuniæ, mercium. Ceterum possunt et quædam esse rei accidentia æstimabilia, ob quæ res licite supra aut infra commune pretium ematur vendaturve, puta ob damnum consequens, lucrum cessans, affectum peculiarem, aut si in gratiam alterius res vendatur ematurve, alioqui non emenda aut vendenda; quæ ipsa accidentia ei cum quo agitur indicanda sunt. Ejus quoque damni aut lucri cessantis ratio haberi potest, quod ex pretii solutione dilata aut anticipata nascitur.

XV. 1 De venditione [7]et emtione notandum, etiam sine traditione, ipso contractus momento transferri dominium posse, atque id esse simplicissimum: ita [p]Senecæ venditio *alienatio est, et rei suæ jurisque sui in alium translatio:* nam et ita fit in permutatione. Quod si actum sit, ne statim

[o] *Ratio haberi solet laborum et expensarum*] Nec improbat id Augustinus ad Ps. lxx. *Sed ait ipse mercator: affero ex longinquo merces: mercedem laboris mei unde vivam peto; dignus est enim mercenarius mercede sua: de mendacio et perjurio agitur, non de negotio.* (§ 17. *Ed. Benedictin.* ubi verba paullo aliter leguntur).

[7] Circa hunc contractum vide PUFENDORF. nostrum, *De Jure Nat. et Gent.* Lib. v. cap. 5. *J. B.*

asked, except when the law has appointed a certain *point* of price for things, as Aristotle speaks.

2 For that common price, account is commonly taken of the labour and expense of the sellers, and it undergoes sudden changes according to the excess or defect of buyers, money, and wares. There may also be certain accidents of the things, capable of an estimation, on account of which the things may be lawfully bought or sold above or below the common price; suppose, on account of loss to be incurred, cessation of gain, particular tastes, or if they are bought or sold to oblige a person, being otherwise not to be bought or sold. Also account may be taken of the loss or cessation of gain which arises from the payment deferred or anticipated.

XV. 1 With regard to Buying and Selling, it is to be noted that the ownership may be transferred at the moment of contract, without delivery, and that this is the simplest process. So Seneca says, that selling is the alienation of the thing, and the transfer of one's property and one's right to another: as exchange also is. And if this be the case, if the ownership be not to pass immediately, the seller is

dominium transeat, obligabitur venditor ad dandum dominium, atque interim res erit commodo et periculo venditoris: quare quod venditio et emtio constat præstando, ut habere liceat, et evictionem, item quod res periculo est emtoris, et ut fructus ad eum pertineant antequam dominium transeat, commenta sunt juris civilis, quod nec ubique observatur: imo plerisque legum conditoribus placuisse, ut ad traditionem usque res commodo et periculo venditoris sit, notavit Theophrastus in loco, qui [q]apud Stobæum est, ubi et multa alia *Serm.* 42.
instituta reperias de solennitate venditionis, de arrhabone, de pœnitentia, multum differentia a jure Romano: sicut et apud Rhodios perfici solitam venditionem et contractus quosdam alios relatione in acta, notavit in Rhodiaca Dion Prusæensis.

2 Illud quoque sciendum, si res bis sit vendita, ex duabus venditionibus eam valituram quæ in se continuit præsentem dominii translationem, [8]sive per traditionem, sive aliter. Per hanc enim facultas moralis in rem abiit a venditore: quod non fit per solam promissionem.

[p] *Senecæ*] *De Beneficiis* v. 10.

[q] *Apud Stobæum est*] Titulo de legibus.

[8] Ponit heic Auctor, in una venditione ab initio dominium translatum, in altera non; nec discrimen omne petit ex traditione uni Emtorum facta, ut perperam intellexit PUFENDORFIUS, dicto capite, § 3. De vero sensu, et de re ipsa, diximus in notis nostris Gallicis ad hunc locum. *J. B.*

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obliged to give the ownership [at an appointed time]. And in the meanwhile, the thing is in the possession and at the risk of the seller. Wherefore that selling and buying consist in giving the means of having the thing sold, and remedy if the title to it prove bad, and that the thing is necessarily forthwith at the risk of the buyer, and also that the produce belongs to the buyer even before the ownership passes, are all fictions of the Civil Law, and are not everywhere observed. Indeed most legislators have provided that up to delivery the possession and risk are the seller's, as Theophrastus holds: and as we find in Stobæus, where you find many other rules about the formalities of sale, about *earnest* of sale, about retraction, very different from the Roman Law: as also that among the Rhodians sale was to be completed, as well as some other contracts, by public registry, as Dio Prusæensis notes.

2 This also is to be observed, that if a thing be sold twice over, that sale of the two is valid which included a present transfer of the ownership either by delivery or otherwise. For by this means the jural claim passes from the seller, which it does not by a mere promise.

Arist. *Pol.* i. 2. XVI. Monopolia [r]non omnia cum jure naturæ pugnant: nam possunt interdum a summa potestate permitti justa de causa et pretio constituto: cujus rei exemplum nobis illustre præbet Josephi historia [9]cum is vice regia Ægypto præesset. Sic et sub Romanis Alexandrini Indicarum et Æthiopicarum mercium habebant, [s]ut Strabo loquitur, μονοπωλείαν. Potest et a privatis institui, æquo duntaxat compendio. At qui, ut in Velabro olearii, [t]de compacto id agunt, ut res supra pretium id quod summum nunc est in communi pretio vendantur, aut vi, aut fraude impediunt ne major copia importetur, aut ideo merces coemunt ut vendant pretio quod tempore venditionis iniquum sit, injuriam faciunt, atque eam reparare tenentur. Quod si alio modo impediunt invectionem mercium, aut ideo coemunt, ut pluris vendant, pretio tamen pro temporis ratione non iniquo, faciunt quidem adversus caritatis normam, quod multis evincit Ambrosius libro officio-
Cap. 6. rum tertio, sed proprie jus alterius non violant.

XVII. De pecunia sciendum, eam naturaliter functionem recipere, [u]non in materia sola, nec in speciali appellatione

[r] *Non omnia cum jure naturæ pugnant*] Nota Thaletis *Historia de Olivitate*, [quæ varie a variis refertur. Vide Arist. *Politic.* I. 11. Diogen. Laert. I. 26. ibique Intt.] Pythoclis inventum de plumbo Tyrio coemendo, unde lucrum faceret Atheniensis populus, est apud Aristotelem *Œconomicon* II. (pag. 510 D. E. *Edit. Paris.* Tom. II.) de monopolio erinaceorum, quibus expoliuntur vestes, vide Plinium VIII. 37. de monopolio serici, Procopium in *Historia Arcana.* (Cap. 25.)

[9] Male quadrat exemplum, ut observavit PUFENDORFIUS, dicto loco.

[s] *Ut Strabo loquitur*] Libro XVII. (p. 798) vide et Cassiodorum 11, 4. et 26. [Istud quoque exemplum de Alexandrinis, non congruit. Inspice Strabonis locum. *J. B.*]

XVI. It is not all monopolies which are at variance with Natural Law. Monopolies may sometimes be permitted by the government for just cause, and at a settled price; of which we have a remarkable example in the account of Joseph's administration of Egypt. So under the Romans the Alexandrians had the monopoly of Indian and Ethiopian wares. Monopolies may also be established by private persons, provided they be on equitable terms. But if persons, like the Velabrian oil-merchants, enter into a combination to raise the price above the common price, or prevent by fraud or force the importation of a larger quantity, that they may buy up the article and sell it at a price which at the time of sale is unreasonable, they are guilty of a wrong, and are bound to repair it. If in any other way they prevent the importation of wares, in order to sell them at a higher price, though in the state of the market not an unreasonable one,

aut forma, sed in genere magis communi, qua scilicet comparatur ad res, aut omnes, aut maxime necessarias: quæ æstimatio, si aliud non convenerit, facienda erit tempore ac loco solutionis. Michael Ephesius ad quintum Nicomachiorum: ὡς Cap. 8.
ἐπὶ τῆς χρείας τοῦτο ἐπὶ τοῦ νομίσματος ἴδοι ἄν τις γινόμενον· ὡς γὰρ ἐπ' ἐκείνης οὐκ ἀεὶ ὁμοίως δεόμεθα καὶ ἐν χρείᾳ τῶν ἀλλοτρίων ἐσμὲν, οὕτως οὐδὲ τὸ νόμισμα ἀεὶ ἴσον δύναται, ἀλλὰ μεταπίπτει. καὶ τὸ πρότερον πλεῖον δυνάμενον ὕστερον ἢ ἔλαττον ἢ οὐδὲν ἰσχύει. ὅμως μᾶλλόν γε τοῦτο διαμένει καὶ δεῖ ὡς μέτρῳ αὐτῷ τῶν ἀλλασσομένων χρῆσθαι. *Quod de indigentia accidit, idem in nummo videre est. Nam sicut ea non eadem semper, nec enim alienis rebus æque semper opus est nobis, sic nec nummus idem semper valet, sed mutatur, et cum prius plus valuerit, postea aut minus aut nihil valet:* [x] *diuturnius autem est nummi pretium: eoque ut mensura aliarum quæ comparantur rerum uti solemus.* Cujus loci hic sensus est: quicquid adhibetur in hoc ut mensura sit rerum aliarum, debet esse tale, ut per se minime flectatur, talia autem sunt

[t] *De compacto id agunt*] Lex æqua et prudens est C. de monopoliis, et locus notabilis apud Lysiam (*Orat.* XXI. cap. 5) adversus frumenti venditores, qui pretium falsis rumoribus incendebant. Adde Cassiodorum IX. 5. &c. quicumque, 9. causa XIV. quæstione IV.

[u] *Non in materia sola, nec in speciali appellatione aut forma, sed in genere magis communi*] Non tam ex substantia quam ex quantitate l. I. D. *de Contrah. Emtione.* Non corpora hic cogitanda, sed quantitas. l. Si is cui. § 1. *de solutionibus* L. 94.

[x] *Diuturnius est nummi pretium*] Publica ac perpetua æstimatio d. l. I. D. *de Contr. Emt.*

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they offend against the law of charity; as Ambrose shews, but they do not properly violate the rights of others.

XVII. Concerning Money, it is to be noted that it naturally operates *functionally*, that is, one portion of it may do the office of another; and this, not only as to the material [gold for silver and reciprocally], nor in its special appellation and form [crowns for dollars], but in a more general sense, in its relation to all other things, or at least to the most necessary; and the estimation of this relation, if no other agreement is made, is to be made with reference to the time and place of payment. So Michael Ephesius says that money, though not in itself immutable, is the measure of all other things: the sense of which is this: that whatever is taken in order to be the measure of other things ought to be such that of itself it is least subject to change: and of this kind are gold, silver, brass: for their value is nearly the same at all times and everywhere: and as

in genere æstimabilium, aurum, argentum, æs: per se enim ferme tantundem ubique, et semper valent: sed prout res aliæ, quibus indigent homines, copiosæ sunt aut raræ, ita eadem pecunia ex eadem facta materia, eodem pondere, nunc plus nunc minus valet.

L. 2. D. Loc. XVIII. Locatio et conductio, [1]ut recte a Caio dictum est, proxima est venditioni et emtioni, eisdemque regulis consistit: respondent enim pretium pensioni sive mercedi, et rei dominium facultati utendi. Quare sicut res domino perit, ita naturaliter sterilitas, et alii casus, qui usum impediunt, damno sunt conductoris: neque eo minus locator jus habebit ad pecuniam promissam, quia ipse facultatem utendi tradidit, quæ eo tempore tantum valebat: quanquam et legibus et pactis immutari id potest. Si tamen locator, cum conductor primus re uti impeditus esset, alii eam locaverit, quicquid consecutus inde fuerit rependet primo conductori, ne ex re aliena fiat locupletior.

XIX. Et quod de venditione supra diximus, pluris rem vendi minorisve emi posse, si in gratiam alterius vendatur ematurve, alias non vendenda aut emenda, idem et de re aut

[1] Confer, de hoc contractu, PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. v. cap. 6. *J. B.*

y *Tantundem et de commodato dici potest*] Valde enim affinia commodatum et mutuum, ut locatio et fœneratio. in l. unica C. Theod. *quod jussu* est: *pecuniam commodat.* Justinianus edidit *mutuam dat.* Nummos autem fœnore sumtos conductos dixit Horatius Lib. I.

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other things which men need are plentiful or scarce, the same money of the same material and weight, is sometimes worth more of those things, sometimes less.

XVIII. Letting and Hiring, as Caius rightly says, come nearest to selling and buying, and are governed by the same rules; the price corresponds to the rent or wages, and the ownership to the use of the thing hired or service rendered. Wherefore as, when a thing is destroyed, the loss falls on the owner, so by Natural Law barrenness of land hired, and other accidents which impede the use, are at the loss of the Hirer; and nevertheless the Letter has a right to the rent promised, because he gave up the power of using the thing himself, which at the time of letting was worth so much; though this may be changed by laws and covenants. But if the Letter, when the first Hirer is prevented making use of the thing, lets it to another, whatever he receives from that bargain he must pay to the first Hirer, that he may not become richer by what belongs to another.

XIX. And what we said above of Selling, that a thing may be

opera locata conductave intelligendum est. Quod si una opera pluribus utilis esse possit, ut itineris susceptio, et locator pluribus se in solidum singulis obstrinxerit, poterit de singulis mercedem pacisci quam ab uno exigeret, ubi lex non obstat: quia quod illa opera secundo quoque utilis est, extrinsecum est contractui qui cum primo est initus, neque respectu primi quicquam minuit de æstimatione.

XX. 1 Circa mutuum quæri solet, quo jure vetitæ sint usuræ? et quanquam jure naturali vetitas esse receptior est sententia, contrarium tamen sentit Abulensis. Neque vero In cap. xxv. *Matth.* q. 171. et 172.
videntur argumenta, quæ in alteram adferuntur partem, talia esse ut assensum extorqueant. Nam quod de mutuo dicitur gratuitum esse, [y] tantundem et de commodato dici potest: cum tamen pro usu rei pretium exigere illicitum non sit, sed efficiat ut contractus in aliud nomen transeat. Nec magis urget quod suapte natura sterilis est pecunia. Nam et domos et res alias natura infœcundas [z] hominum industria fructuosas fecit. Illud speciosius, [2] quod hic res pro re reddatur, usus autem rei a re distingui non possit, cum in abusu consistat, ac proinde pro eo nihil debeat exigi.

Sat. 2. (vers. 9) ubi scholiastes *merces, usura.*

[z] *Hominum industria fructuosas fecit*] Nec enim debet sterilis esse pecunia. l. quid ergo. 3. § *Usuras.* 4. D. *de Contrar. et Util. Act. Tutelæ.* l. debitor. 7. D. *de Usuris.*

[2] Vide quæ Auctor uberius dicit, ad solutionem istius difficultatis, in Adnot. ad Lucam VI. 35. *J. B.*

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bought or sold for more or less if it be done to gratify a person, being otherwise not open to be bought or sold, is to be understood also of a thing or of service let and hired. Or if one service may be useful to many persons, as, for instance, a journey undertaken by an agent, and if the latter (the agent) have engaged himself to several persons jointly, he may demand from each the payment which he would require from one, if the law do not forbid. For the same labour being useful to a second person as well as to the first, is something extrinsic to the contract entered into with the first, and does not diminish the value of his services to the first.

XX. 1 As to Lending Money, it is commonly made a question by what kind of law usury is forbidden. And although the more received opinion is that it is forbidden by Natural Law, Abulensis is of a contrary opinion. And in truth the arguments on the other side are not such as compel assent. For when it is said (1) That money lent is a gratuitous benefit, the same may be said of any other thing lent, and yet it is not unlawful to demand payment for

2 Sed notandum est, cum rerum, quæ usu pereunt, aut in alterius dominium transeunt, ususfructus senatus consulto introductus dicitur, non tamen effectum, ut proprius ususfructus esset, de voce ususfructus agi, quæ certe secundum suam proprietatem tali juri non congruit; non tamen sequi inde jus tale nihil esse, aut non æstimabile, cum contra certum sit, siquis proprietario tale jus cedat, pecuniam posse exigi eo nomine. Sic et jus illud nonnisi post tempus certum reddendi pecuniam aut vinum, est aliquid æstimabile: minus enim solvit qui tempore minus solvit. Atque ideo [a] ἐν ἀντιχρήσει usus pecuniæ cum fructibus prædii compensatur. Quæ vero a Catone, Cicerone, Plutarcho, [b] et aliis contra usuras dicuntur, ea respiciunt non tam quod intrinsecum ei est, quam quod plerumque ei adest, eamque consequitur.

L. 1, 2. D. de Usuf. ear. Rer. q. Usu cons.

L. 1. § Si Ususf. 9. D. ad Leg. Fab.

3 Sed quicquid hac de re sentire libeat, sufficere nobis debet lex a Deo Hebræis data, quæ vetat Hebræos Hebræis

[a] Ἐν ἀντιχρήσει] l. cum debitor. 8. D. *in quibus causis pignus.* l. Si ea pactione. 14. C. *de Usuris.*

[b] *Et aliis*] Ut Appiano in civilibus. (pag. 382 B. *Ed. H. Steph.*)

[3] Mutavit postea sententiam Auctor, ut patet ex ejus Epist. 953. ad Salmasium scripta; sed imprimis ex Adnotationibus ad dictum caput Lucæ, vi. 35. quæ heic omnino conferri debent. De tota autem materia *Fœnoris* et *Usurarum* absolutissimum et plenissimum Opus exstat summi Jurisconsulti, et non minus judicio, quam eruditione, insignis, Clariss. Noodtii, quod seorsim antea editum, inter Opera ejus postea recusum est. *J. B.*

[c] *Honesta moraliter*] Hebræi censent voce נשך significari usuram in pecunia: voce תרבית in quavis specie. Hierony-

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the loan of a thing; this only makes the contract take another name, *letting* instead of *lending.*

Nor is it more convincing to say (2) That money is barren by its nature; for houses and other things which produce no fruits by nature, the industry of man makes fruitful.

The other arguments are more specious, (3) That here, a thing of the same kind is repaid for a thing, and that the use of the thing, money, cannot be distinguished from the thing itself, since it consists *in abusu*, in getting rid of it: and therefore nothing ought to be demanded for it.

2 (4) It is said in the decree of the Senate*, That though there cannot be properly usufruct of a thing which perishes in the using, yet there may be *quasi usufruct* of such a thing, but that it does not thereby become the property of the tenant. But this merely defines the word *usufruct.* Certainly that word does not properly agree with the right of usury. But it does not follow that there is no such right:

* Under Tiberius. Heinecc. *Elem. Jur. Civ.* 419.

pecuniam dare fœnori: [3]Est enim hujus legis materia, si non necessaria, certe [c]honesta moraliter, unde et aliis maxime moralibus annumeratur Psalmo, qui apud Hebræos est decimus quintus, apud Latinos [d]decimus quartus, et apud Ezechielem capite decimo octavo: quæ autem hujus generis sunt, Christianos quoque obligant, quippe vocatos ad majora virtutum specimina: et quæ tunc officia homini Hebræo aut alioqui circumciso (nam hujus cum Hebræo par causa erat) præstari jubentur, ea nunc præstanda sunt homini cuivis, [e]omni populorum discrimine per Evangelium sublato, latiusque extenso proximi intellectu: quod præter cetera ostendit insignis Christi de homine Samarita apologus. Itaque Lactantius de officiis tractans hominis Christiani: *Non dabit*, inquit, *in usuras pecuniam: hoc est enim de alienis malis lucra captare.* Ambrosius: *Subvenire non habenti humanitatis est; duritiæ autem [f]plus extorquere quam dederis.* Ipse

(Margin: v. 5. — v. 8. — *Luc.* x. 29. — *Epist. Inst.* c. 4. — *De Offic.* iii. 3.)

mus *ad* xviii. *Ezechielis: Putant quidam usuram tantum esse in pecunia: quod providens scriptura divina, omnis rei aufert superabundantium, ut plus non capias quam dedisti.* (Tom. v. pag. 440 A. *Ed. Basil.*)

[d] *Decimus quartus*] Et Ps. cxii. χρηστὸς ἀνὴρ ὁ οἰκτείρων καὶ κιχρῶν· *Vir bonus est, qui alterius miseretur, eique pecuniam dat mutuam.* (vers. 5.)

[e] *Omni populorum discrimine per Evangelium sublato*] Christianos Arnobius libro IV. (Pag. 152, 153.) ait esse *communicatores rei, et cum omnibus quos solidet germanitatis necessitudine copulatio.* Alibi: *qui omnes homines pro fratribus diligunt.*

[f] *Plus extorquere quam dederis*] Cyprianus de lapsis gravia peccata enumerans, addit *usuris multiplicantibus*

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since, on the contrary, it is certain that if any one were to grant a proprietor such a right, money might be paid for it.

And the right of not having to repay anything, whether money or wine, till after a certain time, is something which has an estimable value. For he who pays later, pays less. And therefore, in the way of exchange the use of money may be paid for by the use of land.

As to what Cato, Cicero, Plutarch, and others say against usury, it does not touch its intrinsic nature, but its ordinary accompaniments and consequences.

3 But whatever may be our opinion of such arguments, it ought to suffice for us that there was a law given by God to the Hebrews, which forbad Hebrew to lend Hebrew money on usury. For the matter of this law, if not necessary, is certainly morally good; and so is assumed in Ps. xv. 5. Ezek. xviii. 8. And precepts of this kind bind Christians also, as being called to higher pitches of virtue than others; and what was then the duty towards a Jew, is now a duty to all men,

Suet. c. 39. Cæsar Augustus notavit aliquos, quod pecunias levioribus usuris mutuati, graviori fœnore collocassent.

XXI. Observandum tamen est, esse quædam [g]quæ ad usuræ speciem accedant, ac vulgo usuræ esse videantur, cum tamen pacta sint generis alterius: ut de repensando damno, quod facit qui pecuniam dat mutuam, eo quod diu pecunia careat: item de lucro ob mutui dationem cessante, deducto scilicet incerto spei, et labore qui subeundus fuerat. Sic etiam pro impensis ejus qui multis dat mutuam pecuniam, et in hoc paratam habet: et pro periculo amittendæ sortis, ubi idonee non cavetur, si quid exigitur, usura vere non est. Demosthenes
pp. 630, 631. nes oratione *in Pantænetum*, eum, qui quod ex mercatura aut honesta opera quæsivit [h]sub modico lucello elocat, partim

fœnus augere. (Pag. 124. *Edit. Fell. Brem.*) Chrysostomus *de Jejunio* v. *ἐὰν νηστεύσῃς βλέπε μὴ δανείσῃς τὸ ἀργύριόν σου ἐπὶ τόκῳ. νηστεύεις; διάῤῥηξον βιαίων συναλλαγμάτων χειρόγραφον· Si jejunes, vide ne pecuniam tuam colloces fœnori: jejunas? rumpe violentorum pactorum cautiones.* (Tom. vi. pag. 937.) Idem in caput ultimum i. ad Corinthios, (T. iii. pag. 534) pecuniam fœnore partam non magis si in eleemosynam detur, Deo acceptam esse ait, quam si detur ex quæstu meretricio. Augustinus epist. liv. *Quid dicam de usuris, quas etiam ipsæ leges et judices reddi jubent. Ita crudelior est, qui subtrahit aliquid vel cripit diviti, quam qui trucidat pauperem fœnore.* Maximus homilia iii. *de Quadragesima: recte frater frequentabis ecclesiam, si gressus tuos lethalibus laqueis avida illa non implicet et involvat usura.* His adde Basilium in sermones Domini in monte, et quæ ex conciliis sanctisque scriptoribus collegit Gratianus causa xiv. quæst. iii. et iv. [Nullæ sunt Homiliæ Basilii Magni in Sermones Domini in monte: sed una est in Psalm. xiv. adversus Fœneratores, Tom. i. pag. 135, *et seqq. Ed. Paris.* 1638. quam Auctor, quum in animo haberet, ita, lapsu memoriæ, perperam designavit. *J. B.*]

[g] *Quæ ad usuræ speciem accedant*] Et si cum juris Romani consultis loqui volumus, fœnus odiosum nomen est, usura non item. *Usuræ non propter*

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the separation being taken away by the Gospel, and the term *neighbour* more widely extended. So Lactantius and Ambrosius condemn usury. And Augustus noted for rebuke some who borrowed money at low interest and lent it at high.

XXI. It is to be observed, however, that there are some things which approach to the nature of usury, and commonly are held to be usury, which are pacts of another kind: as pacts for making good the loss which he suffers who lends money, by being kept out of his money so long: and on account of the gain which the money-lender loses by lending, deducting what corresponds to the uncertainty of his hopes, and the labour he would have had to undergo. And again, if anything be demanded on account of expenses incurred by him who lends money to many, and has it ready for that purpose; and for the danger of losing the principal, where due security is not taken; this

ut suum servet, partim ut gratum faciat alteri, negat fœneratorum odio prægravandum.

XXII. Leges vero humanæ quæ concedunt aliquid stipulari pro usu pecuniæ, aut rei alterius, ut apud Hollandos jam pridem concessum est aliis quidem [i] octo nummos in centum, mercatoribus autem duodecim pro usu annali exigere, siquidem vere stant intra compensationem ejus quod abest, aut abesse potest, non pugnant cum naturali aut divino jure: sin eum modum excedunt, [k] impunitatem præstare possunt, jus dare non possunt.

XXIII. Contractus avertendi periculi, quem [l] assecurationem vocant, omnino nullus erit si contrahentium alter rem, de qua agitur, aut salvam quo destinabatur pervenisse, aut

lucrum petentium, sed propter moram solventium infliguntur. l. cum quidam 17. § 3. D. *de Usuris.* Cujacius *in Paratitlo de Nautico Fœnore: Fœnus est quod præter sortem accedit lucri causæ: usura, quod accedit ne in damno versetur creditor.* Sed quia plerique etiam usurarum abusi sunt nomine, cœpit et hoc in sequiorem sumi partem: in bonum autem sensum substitui vox ejus quod interest.

[h] *Sub modico lucello*] Procopius Goth. III. in laudibus Germani, qui Justiniano propinquus: *χρήματα τοῖς δεομένοις ἅπασι δεδανεικὼς μεγάλα, καὶ τόκον οὐδὲ ὅσον λόγῳ κεκομισμένος πρὸς αὐτῶν πώποτε· pecunias omnibus opus habentibus magnas dabat utendas, usuram autem, quæ quidem talis dici mereretur, nunquam ab ipsis sumebat.* (Cap. 40.)

[i] *Octo nummos in centum*] Idem in Imperio constitutum.

[k] *Impunitatem præstare possunt*] Ideo permissas ante se usuras ad normam æquiorem reducere Justinianus sui officii censuit: novellis XXXII. XXXIII. XXXIV.

[l] *Assecurationem*] Id damnum in se suscipere dixit Suetonius *Claudio.* (c. 18.) Sic Cicero pecuniæ publicæ prædes accepit, ut populo cautum esset sine vecturæ periculo, epistolarum 11, 17.

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is not usury. So Demosthenes in his oration against Pantænetus, denies that he is to be stigmatized as an usurer because, what money he gained by commerce or manufacture he lent out at moderate interest, partly to keep the capital, partly to gratify another.

XXII. Human Laws which allow something to be covenanted for the use of money, if the rate lie within a due compensation, are not opposed to Natural or Divine Laws, as in Holland it has long been granted to persons in general to require 8 per cent. per annum, and to Merchants 12. If they exceed that standard, laws may afford impunity, but they cannot give a right.

XXIII. Contracts for averting risk, which are called Insurance, are void if either of the contracting parties know that the thing insured has either reached its destination safely, or is lost: not only on account of the parity which the nature of permutatorial contracts requires, but also because the proper matter of this contract is loss

periisse sciverit: non tantum ob paritatem quam exigit contractuum permutatoriorum natura, sed quia propria materia hujus contractus est damnum sub ratione incerti. Periculi autem hujus pretium ex communi æstimatione petendum est.

XXIV. 1 [m] In societate negotiatoria, [4] ubi confertur pecunia cum pecunia, si pecuniæ æquales sint, æquales esse etiam oportet partes in damno et lucro; sin inæquales fuerint, partes quoque fient pro rata: quod Aristoteles fine octavi *Nicomachiorum* sic extulit: ἐν χρημάτων κοινωνίᾳ πλείω λαμβάνουσιν οἱ συμβαλλόμενοι πλείω. Atque idem habebit locum si operæ aut æquales aut inæquales conferantur. Sed et opera cum pecunia, aut cum pecunia et cum opera conferri potest, ut dici solet.

Cap. 16.

Par pari datum hostimentum est, opera pro pecunia.

Plaut. *Asin.* i. 3. 20.

2 Sed hæc collatio non uno modo fit: nam aut opera confertur cum solo pecuniæ usu, quo casu sors domino perit, et si salva est, domino salva est: aut opera confertur cum ipso dominio pecuniæ, quo casu qui operam impendit particeps fit sortis. In prima specie comparatur cum opera non sors, sed periculum amittendæ sortis, et lucrum quod probabiliter ex ea sperari poterat. In altera operæ pretium ha-

Navar. 17. n. 250. Covar. iii. *Var.* cap. 2. Less. ii. 2, 25. dub. 3.

[m] *In societate*] Exemplum societatis habes in delphinis apud Plinium, Lib. IX. cap. 8. et in pinna ac pinnotere IX. 42. meminit et Cicero *de Finibus,* (III. 19.)

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uncertain. The value of such danger is to be sought in common estimation.

XXIV. 1 In Partnerships in trade, where money and money are contributed by the parties, if the sums are equal, the gain and loss ought to be equally shared: if unequal, proportionally to the shares: Aristotle's rule. The same will hold if equal or unequal shares of labour are contributed. But money may be compared with labour, and labour with money. See Plautus.

2 But this joint contribution may be made in various ways: for either labour may be supplied by one party and the use of money (annual payment) by the other: in which case if the money-share be lost, the loss is the owner's, and if it be saved the gain is his: or labour and the ownership of money (capital) are the relative contributions; in which case he who supplies the labour partakes in the money-share. In the first case that which is compared with the labour is not the money-share, but the risk of losing it, and the gain which might be expected from it. In the other case the value of the labour is considered as something added to the money-share, and according to such value, he who supplies the labour has a share in

betur quasi sorti adjectum, et pro eo quod valet in ipsa sorte partem habet qui operam præstat. Quod de opera diximus, idem et de labore ac periculo navigationis, et similibus intelligi debet.

3 Ut autem sociorum aliquis lucri sit particeps, immunis damni, est quidem præter naturam societatis: potest tamen ita conveniri sine injuria: fiet enim mixtus contractus ex societate et ex contractu aversi periculi, in quo ita servabitur æqualitas, si tanto plus lucri ferat, quam alioqui laturus fuerat qui in se damnum recepit. Ut autem quis damnum sentiat sine lucro, ideo admittendum non est, quia ita naturalis est societati utilitatum communio, ut sine ea nequeat societas consistere. Quod autem dictum est a Jurisconsulto non expressis partibus æquales intelligi, ita demum pro vero habendum est, si quæ conferuntur sint æqualia. In societate autem universorum bonorum non id quod hinc aut illinc obvenit, sed quod probabiliter sperari poterat, comparandum est.

Angel. *Verb. Societ.* i. § 7. Sylv. *Verb. Societ.* i. q. 2. Navarr. 17. n. 255. Covarr. et Less. *d. Loc.* *L. Si non. D. pro Socio.*

XXV. In societate navali adversus piratas utilitas communis est ipsa defensio: interdum et præda. Solent autem æstimari naves, et quæ in navi sunt, atque ex his summa confici, ut damna quæ eveniunt, in quibus sunt et vulneratorum

Liv. xxiii. 49. Arist. *Pol.* iii. 9.

[4] Circa hunc contractum confer PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. v. cap. 8.

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the capital. What we have said of labour is also to be understood of the labour and risk of navigation, and the like.

3 That any one of the partners shall share the profit and not suffer by the loss, is against the nature of partnership; but such an agreement may be made without wrong. For then the contract will be a mixture of Partnership and Insurance; and the equality will be preserved, if he who in case of loss has taken the risk of loss, receives more of the profits in proportion. But that any one should bear the loss without profit is not to be admitted, because in partnerships the community of interests is so natural, that without it partnership cannot subsist. What the Jurists say, that when the shares are not mentioned they must be understood to be equal, is true only if the contributions are equal. And in the common undertakings of good men, we must compare, not what happens here or there, but what may be probably hoped.

XXV. In associations of shipowners for mutual protection against pirates, the common utility aimed at is the protection; sometimes also the taking of prizes (privateering). The custom is to value the ships and cargo and to make up a sum in this way, and to appor-

impendia, ferantur a dominis navium et mercium [n] pro parte quam habent in ea summa. Et hæc quidem, quæ diximus hactenus, ipsi juri naturæ sunt consentanea.

XXVI. 1 Nec in his jure gentium voluntario quicquam mutatum apparet: uno excepto, quod inæqualitas rerum in quam consensum est, [5] ubi nec mendacium intercessit, nec ejus quod dictum oportuit reticentia, in actionibus exterioribus pro æqualitate habetur: ita ut quomodo jure civili ante constitutionem Diocletiani actio in foro nulla dabatur adversus talem inæqualitatem, ita nec inter eos qui jure gentium solo sociantur exactio aut coactio sit eo nomine. Hoc enim

L. 16. § 4. D. de Minor. est quod ait Pomponius, in pretio venditionis et emtionis
L. 22. § f. D. Locati. naturaliter licere se mutuo circumvenire: ubi licere est non quidem fas esse, sed ita permitti ut nullum contra proditum sit remedium in eum qui se pacto velit defendere.

2 [o] Naturaliter autem eo in loco, ut et alibi interdum, positum est pro eo quod recepti passim moris est: quomodo apud
1 *Cor.* xi. 14. Apostolum Paulum ipsa natura docere dicitur viro turpe esse comam alere, cum tamen id neque repugnet naturæ, et multos apud populos usitatum sit. Sic idolorum cultores, non autem quosvis homines *φύσει ματαίους*, id est, *natura vanos*
xiii. 1. appellat scriptor libri Sapientiæ, et *τέκνα φύσει ὀργῆς*

[n] *Pro parte quam habent in ea summa*] Vide simile in l. Wisigotthorum, Libro v. tit. v. c. 5.

[5] Confer heic PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. v. cap. 3. § 9. *J. B.*

[o] *Naturaliter autem eo in loco*] Sic Gellius, Lib. IX. c. 10. *de Actu Conjugali: rem naturæ lege operiendam.*

[6] Post primam istius Operis recen-

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tion the losses which take place, among which are the expenses of the wounded men, among the owners of the ships and cargoes according to their proportion of that sum. And what we have hitherto said on this subject is agreeable to Natural Law.

XXVI. 1 Nor in these matters is anything changed by the instituted Law of Nations; excepting this only, that if an inequality of the contributions be agreed upon, this, where there is neither false declaration nor reticence of what ought to have been said, is in exterior actions held for equality. And thus, as by the Civil Law before Diocletian there was no action before a court of law for such inequality, so now among those who are connected only by the Law of Nations, there is no demand or compulsion allowed on that account. This agrees with what Pomponius says, that in the price of selling and buying, it is naturally allowed to men to circumvent one another: where *allowed* means, not that it is right, but that there is such per-

Paulus Apostolus, non tam ex sua quam ex Romanorum, apud quos tum vivebat, persona loquens. Euenus poeta vetus: *Eph.* ii. 3. *Gnom.* p. 131.

> *Φημὶ πολυχρόνιον μελέτην ἔμεναι, φίλε, καὶ δὴ*
> *Ταύτην ἀνθρώποισι τελευτῶσαν φύσιν εἶναι.*
>
> Quod meditare diu durabile fiet, amice,
> Atque id naturam credo mortalibus esse.

Ejusdem sensus dictum vetus apud Galenum extat: *ἐπίκτητοι φύσεις τὰ ἔθη, consuetudo adscititia est natura.* Apud Thucydidem simili notione dicitur *τῶν νόμων κρατήσασα ἡ ἀνθρωπεία φύσις· humana natura legum victrix.* Sic *πεφυσιωμένα* dicunt [o]Græci tum virtutes tum vitia postquam altas radices egerunt. Apud Diodorum vero Siculum legimus: *τῆς φύσεως ὑπὸ τῆς ἀνάγκης ἡττωμένης· cum necessitas naturam, id est, robur animi vinceret.* Sic Pomponius Jurisconsultus, cum dixisset jus Romanum non pati eundem in paganis et testato et intestato decedere, addidit earum rerum naturaliter inter se pugnam esse, cum tamen ea regula e solis Romanorum moribus pendeat, neque apud alios populos locum habeat, ac ne apud ipsos quidem Romanos [p]in militum testamento. *Lib.* iii. 84. *Lib.* xvi. 18. p. 519. *L. Jus. Nost.* 7. *D. de R.* I.

3 Evidens autem fuit utilitas ejus quod dixi juris intro-

sionem incidi forte in locum CLEMENTIS Alexandrini, unde videtur auctor id hausisse. Ita enim ibi de Gnostico suo Vetus Ecclesiæ Doctor: *Τῷ ἄρα ἀναπόβλητον τὴν ἀρετὴν ἀσκήσει γνωστικῇ πεποιημένῳ, φυσιοῦται ἡ ἕξις. Stromat.* Lib. VII. cap. 7. pag. 859. *Edit. Potter. J. B.*

p *In militum testamento*] Imo et in paganorum testamentis sæpe, ubi inoffi-

mission that no remedy exists against him who offers such a defense.

2 *Naturally*, in this place, as in some others, is put for what is everywhere a received custom: as St Paul says that nature herself teaches us that it is shameful for a man to have long hair; though it is not repugnant to nature, and is the usage among many peoples. (1 Cor. xi. 14.) So the Author of the Book of Wisdom calls the worshippers of idols (not all men) vain by nature (xiii. 1), and St Paul, *by nature the children of wrath* (Eph. ii. 3), not speaking so much in his own character, as in that of the Romans, among whom he was then living. So Euenus, Galen, Thucydides, Diodorus: and so the Greeks spoke of *naturalized* virtues and vices. So Pomponius, when he says that a civilian could not die both testate and intestate, adds that the two things are naturally at variance: although that rule depends solely on the customs of the Romans, and has no place among other peoples, and not even among the Romans in soldiers' testaments.

3 The utility of introducing such rules as I have mentioned is

ducendi, ad præcidendas controversias infinitas, et ob incerta rerum pretia inter eos, qui communem judicem non habent, inexplicabiles, quæ vitari non poterant si ob inæqualitatem a

L. Si Volun. 8. C. de Resc. Vend. pactis discedere licuisset. *Hæc est emtionis atque venditionis substantia* (aiunt Imperatores, substantiæ nomine morem perpetuum significantes) *quod emtor viliore comparandi, venditor cariore distrahendi votum gerentes ad hunc contractum accedant, vixque* [q]*post multas contentiones, paulatim venditore de eo quod petierat detrahente, emtore autem huic quod obtulerat addente, ad certum consentiant*

L. 6. de Ben. 15. *pretium.* Seneca ait hoc jus respiciens: *Quid interest quanti sint, cum de pretio inter ementem et vendentem convenerit? Nihil venditori debet qui bene emit.* An-

Nic. v. 5. dronicus Rhodius sensu eodem: *τὸ γὰρ ἐν τοῖς ἑκουσίοις συναλλάγμασι κέρδος οὔτε ἄδικόν ἐστιν, οὔτε εὐθύνεται. τούτων γὰρ ἄδειαν ἔδωκεν ὁ νόμος· Lucrum, quod* [7]*voluntate contrahentium percipitur, nec injustum est, nec corrigitur. Ejus enim rei licentiam lex concesssit.*

Apud Phot. Cod. 242. p. 1044. 4 Is, quem indicavi paulo ante, scriptor vitæ Isidori, minoris justo emere, aut pluris vendere, vocat *ἀδικίαν ὑπὸ μὲν τοῦ νόμου ἀφειμένην, τὸ δὲ δίκαιον ἀνατρέπουσαν· injustitiam a lege quidem permissam, sed quæ re ipsa justum pervertat.*

ciosi querela instituitur. l. 19. mater. l. nam etsi. 15. l. circa. 24. D. *de Inoff. Testament.* addita l. cum duobus 13. C. eodem titulo.

q *Post multas contentiones*] Festus: *Cociones dicti videntur a cunctatione, quod in emendis vendendisque mercibus tarde perveniant ad justi pretii finem, itaque apud antiquos prima syllaba per U literam scribebatur.* Quintilianus declamatione pro civibus: *diu concionatus est.* (*Decl.* XII. pag. 218. *Ed. Obrecht.*)

7 Vertendum erat: *quod in Contractibus voluntariis,* &c. *J. B.*

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evident, in order to obviate infinite controversies, which could not have been put on clear grounds in consequence of the uncertain prices of things among those who have no common judge, and which would have occurred if it had been reckoned lawful to depart from pacts on account of the inequality of conditions. So the Imperial Laws recognize Buying and Selling as being the result of long haggling and final agreement. So Seneca, and Andronicus Rhodius.

4 The writer of the life of Isidore calls this, injustice allowed by law.

CAPUT XIII.

DE JUREJURANDO.

I. *Jurisjurandi quanta vis sit etiam ex paganorum opinione.*

II. *Animum deliberatum requiri, nempe ut quis jurare voluerit.*

III. *Verba jurantis obligare in sensu quo ea creditur accepisse cui juratum est.*

IV. *Juramentum dolo elicitum quando obliget.*

V. *Juramenti verba non extendenda ultra receptum loquendi morem.*

VI. *Juramentum non obligare de re illicita factum:*

VII. *Aut quod impediat majus bonum morale:*

VIII. *Aut si factum sit impossibile:*

IX. *Quid si impossibile sit ad tempus?*

X. *Jurari Deo nominato, et quo sensu:*

XI. *Sed et nominatis rebus aliis, cum respectu ad Deum.*

XII. *Juramentum esse etiamsi per falsos Deos juretur.*

XIII. *Effectus jurisjurandi: inde obligatio ex jurejurando duplex, tempore jurisjurandi, et postea: quod distincte explicatur.*

XIV. *Quando ex jurejurando jus quæratur homini et Deo, quando Deo tantum.*

XV. *Refellitur sententia statuens eum, qui piratæ aut tyranno juravit, Deo non teneri.*

XVI. *Qui perfido juravit, an implere debeat, distinctione explicatur.*

XVII. *Cum Deo soli quis obligatus fuit, heredem ejus ad nihil teneri.*

XVIII. *Perjurum non esse, qui non implet nolenti impleri, aut sublata qualitate ejus, cui sub illa qualitate juratum est.*

XIX. *Quando irritum sit, quod contra juramentum fit.*

XX. *Superiorum actus quid possit circa id, quod subditus juraverit, aut quod subdito juratum est, cum distinctionibus exponitur.*

XXI. *Monita Christi de non jurando, ad quale juramentum proprie pertineant.*

XXII. *Quæ fides injurata juramenti vim ex more habeat.*

I. 1 APUD omnes populos et ab omni ævo circa pollicitationes, promissa et contractus, maxima semper vis fuit jurisjurandi. [1]Nam ut Sophocles ait Hippodamia: Apud Stob. Serm. 27.

[1] Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. IV. Cap. 2. *J. B.*

CHAPTER XIII. *Of Oaths.*

I. 1 Among all peoples, and in every age, the force of Oaths in proposals, promises, and contracts, has always been very great. So Sophocles in the Hippodamia; Cicero.

Mens excitari jurejurando solet,
Ut bina diligenter evitet mala,
Culpari amicis, et Deos offendere.

Offic. iii. 20. *Nullum vinculum,* inquit Cicero, *ad adstringendam fidem majores nostri jurejurando arctius esse voluerunt.*

2 Hinc gravis pœna perjuris imminere nunquam non credita: ut Hesiodus dixit de juramento: (*Theog.* v. 231.)

Clades mortalibus unde
Adveniunt, quoties fallaci pectore jurant.

[a]Ita ut posteritas etiam majorum delicta lueret, quod non nisi de gravissimis criminibus creditum: et sine facto voluntas quoque pœnam in se accerseret: quorum utrumque Herodotus confirmat narratione de Glauco Epicydide, qui deliberaverat tantum, an juratam de deposito fidem falleret: ubi hoc carmen Pythiæ adfert idem Herodotus: (Lib. vi. 86.)

At juramento quædam est sine nomine proles
Trunca manus et trunca pedes: tamen impete magno
Advenit, atque omnem [b]vastat stirpemque domumque.

Sat. xiii. 208. Et eandem historiam recitans Juvenalis ita concludit:

Has patitur pœnas peccandi sola voluntas.

Offic. iii. 29. 3 Bene Cicero: *Est jusjurandum affirmatio religiosa;*

[a] *Ita ut posteritas etiam majorum delicta lueret*] Vide Servium in excerptis Fuldensibus ad I. *Æneidos.* [Nihil ibi invenio, quod ad rem faciat. Vide ipsum Poetam, *Georg.* I. 502. *J. B.*]

[b] *Vastat stirpemque domumque*] Vide Zachariam, v. 3, 4. et interpretem ejus loci Chrysostomum *de Statuis* XV. (Tom. VI. pag. 565. *Ed. Savil.*)

[c] *Ut de Cydippe narratur*] Exstat similis narratio in metamorphosibus Antonini Liberalis *de Ctesylla et Her-*

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2 And a heavy punishment was understood to await the perjured: so Hesiod. So that the posterity would have to expiate the crime of their ancestors, which was only believed in the case of the greatest crimes: and it was believed that even the will to commit perjury, without the deed, would bring down punishment. See Herodotus in the story of Glaucus, and Juvenal.

3 Cicero says well, *An Oath is a religious affirmation: what you promise solemnly, God being referred to as witness, is to be kept.* What he adds, *For then the matter pertains, not to the anger of the gods, for there is no such feeling, but to justice and good faith,* is not to be rejected, if by *anger* he understands a perturbation, a passion: but if a purpose or will of punishing, is by no means to be received, as Lactantius proves.

Let us now see whence the force of an Oath arises, and to what it tends.

quod autem affirmate quasi Deo teste promiseris, id tenendum est. Quod autem addit: *Jam enim non ad iram Deorum, quæ nulla est, sed ad justitiam et fidem pertinet:* si iræ nomine perturbationem intelligit, non improbandum est; sin qualemcunque nocendi affectum aut voluntatem, minime est recipiendum, ut recte probat Lactantius. Nunc unde vis jurisjurandi oriatur, et quo pertingat usque videamus. *Lib. de Ira Dei.*

II. Primum quod de promissis et contractibus diximus, et hic habet locum, ut animus rationis compos et deliberatus requiratur. Quare si quis non putans se jurare verba protulerit jurantia, [c] ut de Cydippe narratur, locum habere potest quod ei tribuit Ovidius (Epist. *Heroid.* xxi. 135):

> [d] Quæ jurat mens est: nil conjuravimus illa.

ex Euripide desumtum qui in *Hippolyto* dixerat (ver. 612):

> Jurata lingua est: [e] mente juravi nihil.

Quod si quis volens jurare obligare se noluerit, non eo minus obligatur, quia obligatio a juramento est inseparabilis, et effectus ejus necessarius. Soto, viii. q. 1. art. 7. Covarr. *ad c. Quamv.* Part. 1, § 5.

III. 1 At si quis deliberato protulerit verba jurantia, animo tamen non jurandi, hunc non obligari sunt qui tradunt, peccare tamen temere jurando. Sed verius est teneri eum

mochare, (cap. 1.)

[d] *Quæ jurat mens est*] Ibidem:

Consilium prudensque animi sententia jurat,
Et nisi judicii vincula nulla valent,

(vers. 137, &c.)

mox:

Sed si nil dedimus præter sine pectore vocem,
Verba suis frustra viribus orba tenes.
Non ego juravi: legi jurantia verba.

et quæ sequuntur.

[e] *Mente juravi nihil*] Quia de re honesta tacenda, nutricis verba intellexerat Hippolytus, non de adulterio et incestu.

II. First, that has place here, which we said of promises and contracts, that there is required a mind master of its reason and deliberate. Hence if any one, not thinking to swear, utters the words of an oath, it is not swearing. See in Ovid the story of Cydippe, [who read aloud on an apple which Acontius her lover had thrown at her, *I swear that I will marry Acontius.*] So Euripides in the Hippolytus.

But if any one, willingly swearing, wished not to bind himself, he is not the less obliged, because obligation is the necessary effect of an oath, and inseparable from it.

III. 1 But if any one utters the words of an oath, but with a purpose of not swearing, there are writers who hold that he is not bound, but that he sins by swearing rashly. But the sounder opinion is, that he is bound to make true the words to which he took God to

vera facere dicta quorum Deum adhibuit testem: nam is actus, qui per se est obligatorius, ex animo deliberato processit. Cui consequens est ut quanquam plerumque verum est illud Tullii; *Quod ex animi tui sententia juraveris, id non facere perjurium est;* quo et illud pertinet quod apud Homerum jurans Ulyssi Calypso ait:

De Offic. iii. 29.

Odyss. v. v. 183.

Ἀλλὰ τὰ μὲν νοέω καὶ φράσσομαι.

Verum animus quod sentit idem loquar.

2 Id tamen hanc exceptionem habeat, nisi qui jurat sciat, aut probabiliter credat, ab eo quicum negotium est, verba aliter accipi: nam dictis ipsis testem adhibens Deum, debet dicta facere vera [f]quomodo putat intelligi. Et hoc est quod idem ait Cicero: *Quod ita juratum est, ut mens deferentis*[2] *conciperet fieri oportere, id servandum est.* Apud Tacitum legimus: *Trepidis et verba jurisjurandi per varias artes mutantibus, queis flagitii conscientia inerat.* Augustinus: *Perjuri sunt qui servatis verbis exspectationem eorum, quibus juratum est, deceperunt.* Et [g]Isidorus: *Quacunque arte verborum quis juret, Deus tamen, qui*

Hist. iv. 41.

Epist. ccxxiv.

[f] *Quomodo putat intelligi*] Augustinus epistola CCXXIV. de illo locutus qui a Punicis castris egressus in castra redierat, inde Romam venerat: *ita non attenderunt qui illum Senatu moverunt, quid ipse jurando cogitasset, sed quid ab illo quibus juraverat exspectarent.* (*Epist.* 125. novæ *Edit. Benedictin.*) Vide et sequentia. Vide ad hanc rem pulchre dicta concilio Trosleiano tomo III. conciliorum, editionis Sirmondianæ. Et apud Hincmarum in opusculo *de Divortio Lotharii et Thietbergæ* ad interrogationem VI. ubi in hanc sententiam recte de Deo dicitur:

Qui non ut juras, sed ut is jurasse putavit
Cui juras, audit: sic es utrique reus.

In professione jurata Hebræorum per Hispaniam: *Si non ea intentione perfeceris, sicut a nobis me profitente audita atque intellecta sunt.*

[2] Vox illa *deferentis* abest ab optimis Editionibus. Omnino agitur ibi de animo jurantis, non de sensu quem verbis ejus tribuit is, qui defert jusjurandum. Adeoque locus nihil ad rem facit, ut dudum observavimus ad PUFENDORFIUM nostrum, dicto capite, § 15. Not. 2. *J. B.*

[g] *Isidorus*] Lib. II. *de Summo Bono*

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witness: for that act, which is of itself obligatory, proceeded from a deliberate mind. And hence it follows that, as Cicero says, not to do what you intentionally swear is perjury. See Homer.

2 This is so, with the exception of the case in which you who swear, know or believe that he with whom you have to do takes your words otherwise: for in taking God to witness his words, he ought to perform them as he supposes them to be understood. So Cicero regulates an oath by the *mens deferentis*, the mind of the proposer. Tacitus speaks of men in fear changing the words of the oath: Au-

conscientiæ testis est, ita hoc accipit sicut ille cui juratur intelligit. Atque hoc est quod dicitur [h]liquido jurare. Ideo Metellus recte recusavit jurare in legem Apuleianam, quanquam erant qui dicerent legem ob rogationis vitium esse irritam, et juramentum in legem ita intelligendum, si lex rite rogata lataque esset. App. *de Bell. Civ.* i. p. 368.

3 Nam quanquam in promissis aliis facile subintelligitur tacita aliqua conditio, quæ promissorem exsolvat, id tamen in juramento admittendum non est: quo pertinet egregius ille locus Apostoli ad Hebræos: *Deus volens abundantissime heredibus promissionis ostendere immutabilitatem consilii sui, fidem fecit jurejurando: ut per duas res immutabiles, in quibus fieri non potest ut fallat Deus* (ita recte verti puto illud ψεύσεσθαι, sicut aperta locutio vocatur veritas, Dan. vii. 16, viii. 26, x. 1), *firmum habeamus solatium.* Quæ verba ut intelligantur, sciendum est sanctos scriptores de Deo sæpe loqui ἀνθρωποπαθῶς, et magis secundum id quod videtur nobis, quam quod est. Pan. *in c. Cleric. de Jurejur.* Sil. *in Verb. Juram.* 4. q. 23. vi. 17. *ibi* Thom.

4 Nam Deus vere decreta sua non mutat. Mutare ta-

cap. xxxi. 1. citatur causa XXII. quæst. v. c. quacumque. 9.

[h] *Liquido jurare*] Donatus ad illud in *Andria* (IV. 3, 12):

Quia si forte opus ad herum jurejurandum mihi,
Non apposuisse, ut liquido possim.

Liquido; pure; et manifeste. χρεὼν μὴ ὑπονοθεύειν ἑτέρᾳ φράσει τὰ ῥήματα, ἀλλ' ὡς ἐπὶ λέξεων εἶχον, οὑτωσὶ καὶ δηλοῦν, ait in Alexio Nicetas fraudem Andronici Comneni culpans. *Oportuit non quæsita locutione verba adulterare, sed ut concepta ea fuerant eloqui.* Qui et alibi, de Alexio contra sensum verba captante: τοῖς ῥήμασι τούτοις ἐγκαθίσας, ὡς αἱ μυῖαι τῷ μώλωπι· *ita verbis illis insidebat ut muscæ vibici.* Graviter in hanc regulam peccavit aula Arcadiana, quæ effecit ut Chalcedone occideretur is qui Constantinopolim, salute ipsi per jurisjurandum promissa, venerat. Zosimus, Lib. v. Adde quæ infra cap. xvi. 2. [Duo loca NICETÆ unum idemque sunt, et in posteriore etiam de Andronico Comneno agitur, non de Alexi: Lib. I. cap. 3. in Alex. Locus autem Zosimi (non Sozomeni, ut habuerant hactenus Edd. post illam 1642. ubi Zozomenus, cor-

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gustine, of men keeping the words and balking the expectation. So Isidore. To swear without reserve is *liquido jurare.* So Metellus, rightly, would not swear to the Apuleian law, though it was void, as being informally passed.

3 For though in promises some tacit condition may be understood which absolves the promiser, that is not so in an Oath. So St Paul, Heb. vi. 18, That by *two* immutable things, in which it was impossible for God to *deceive:* speaking after the manner of men.

4 For God does not really change his decrees. He is said to

Jonæ iv. 2. men et [i]pœnitentia duci dicitur, quoties aliter agit quam verba sonare videbantur, nimirum [k]ob conditionem tacite intellectam, quæ cessat. Jer. xviii. 8. Exempla videre est Gen. xx. 3; Exod. xxxii. 14; 1 Reg. xxi. 28; 2 Reg. xx. 1; Esaiæ xxxviii. 1; Jonæ iii. 5, 11. Quo sensu etiam nos fallere Deus improprie dici potest. Et solet vox ψεύδεσθαι, quæ in dicto loco ad Hebræos apparet, significationem habere eventus spem frustrantis, ut videre est tum alibi, tum Levit. vi. 2; Josue xxiv. 27; Esai. lviii. 11; Os. ix. 2; [l]Abac. iii. 17. Facillime autem hoc procedit in comminationibus, quia illæ jus nemini conferunt. In promissis interdum, ubi scilicet conditio tacita quædam subest.

5 Ideo duas res Apostolus nominat quæ immutabilitatem notant, promissionem, quia jus dat; et juramentum, quia conditiones tacitas et aliquo modo latentes repellit: ut videre est etiam Psal. lxxxix. 30, 31, 32, 33, 34, 35, 36. Nam aliud est si quas conditiones ipsa negotii natura aperte indicet.

rupte) est cap. 18. *Ed. Cell.* Lib. laudati v. *J. B.*]

[i] *Pœnitentia duci dicitur*] Concilium Toletanum VIII. cap. 2. *Jurare namque Dei est a seipso ordinata nullatenus convellere, pœnitere vero, eadem ordinata cum voluerit, immutare.* Retulit Gratianus in causam XXII. quæst. IV. c. 9. Explica vero ut in textu nostro.

[k] *Ob conditionem tacite intellectam*] Senecam vide Naturalium Quæstionum 11, 37.

[l] Abac. iii. 17.] Adde Jobum xl. 28. Oseam ix. 2.

[m] *Supposuisse quod revera se ita non habeat*] Ut Hippolytus, de quo modo diximus. Ad illud Sophoclis in *Œdipode Coloneo* (vers. 226):

Ἀπάτα δ' ἀπάταις
Ἑτέραις ἑτέρα παραβαλλομένα,
Πόνον οὐ χάριν ἀντίδοσιν ἔχει.

Fraus ad fraudem superaccedens,
Non benefactis, sed atroce solet
Clade rependi.

Sic ait, *καὶ αὐτοὶ οὖν νομίζου σιπροσδεδέχθαι αὐτὸν καὶ ἐπηγγέλθαι τὴν ἀσ-*

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change and to repent, when he acts otherwise than the words seem to imply, which he does on account of a condition tacitly understood, which has ceased. See the passages. And in this sense God may improperly be said to *deceive* us; the word often meaning to *frustrate hope*. See the passages. And this appears more plainly in threats, because they give no right: sometimes in promises, where there is a tacit condition.

5 Therefore the Apostle speaks of two things which mark immutability; the promise, which gives the promisee a right; and the oath, for that repels tacit and latent conditions. See the Psalms as quoted. For it is another thing if any conditions are openly indicated by the nature of the transaction. And to this some refer Numb. xiv. 30: *Ye shall not come into the land concerning which I sware to make you dwell therein.* But it is more exact to say that the land was sworn, not

Quo nonnulli referunt id quod legitur Num. xiv. 30. Sed verius est terram promissam jurato dici ipsis, non personis, sed populo, posteris scilicet eorum quibus Deus juraverat, com. 23. Talis autem promissio impleri quovis tempore potest, nec personis certis adstringitur.

IV. 1 Ex his quæ diximus intelligi potest quid sentiendum sit de jurejurando quod dolo elicitum est. Nam si certum est, eum qui juravit aliquod factum [m]supposuisse, quod revera se ita non habeat, ac nisi id credidisset non fuisse juraturum, non obligabit juramentum. At si dubium sit, an non etiam sine eo idem fuisset juraturus, standum erit verbis, quia simplicitas quam maxima juramento convenit. Navarr. c. 12. n. 13.

2 Atque huc refero jusjurandum, quod Josue et primores populi Israëlitici Gabaonitis dederunt. Decepti quidem erant a Gabaonitis, e regione longinqua se venire fingentibus. At non [3]inde sequebatur Josuam et primores, si scissent ex vicinis populis eos esse, non fuisse eis parcituros. Nam quod *Jos.* ix.

φάλειαν αὐτῷ, ἀπατώμενοι καὶ οὐ πρότερον ἐπεγνωκότες, ὅτι οἰκείαις ἐνέχεται μιάσμασι· τοιοῦτόν ἐστι καὶ τό·

Ἡ γλῶσσ' ὀμώμοχ', ἡ δὲ φρὴν ἀνώμοτος.

Καὶ ἐκεῖνος γὰρ ἀπατηθεὶς ὤμοσε. *Putant Thebani se suscepto Œdipodi promisisse incolumitatem, causa ab ipso data, cum non ante didicissent piaculo cum domestico teneri.* Tale et illud.

Jurata lingua est: mente juravi nihil.

Namque et Hippolytus deceptus juraverat. [In verbis Scholiastæ tria erant menda, quæ sustuli. Sed et in ultimo versu Sophoclis, pro ἀντίδοσιν ἔχει, optimæ Editiones, ut illa H. Stephani, habent, ἀντιδίδωσιν ἔχειν. Sensus autem totius loci hic est: *Qui sese exponit periculo fraudis vicissim excipiendæ ab eo in quem fraude usus est, ille non beneficia, sed molestas et dolorem sibi repensum iri, sperare debet.* Ita, ni fallor, accuratior est versio, quam auctoris nostri. *J. B.*]

[3] At vide quæ diximus in PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. ii. § 7. not. 1. *J. B.*

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to the individuals, but to the People, namely, the posterity of those to whom God had sworn, as ver. 23. Such a promise may be fulfilled at any time, and is not restricted to certain persons.

IV. 1 From what has been said, it may be understood what is to be judged of an oath obtained by fraud. For if it be certain that the swearer supposed some fact which is not so, and would not have sworn except he had so believed, then the oath is not binding. But if it be doubtful whether, even without that fact, he would not have sworn the same, he must stand by his words, because simplicity in the highest degree is suitable in swearing.

2 To this I refer the oath of Joshua and the elders of Israel to the Gibeonites, Josh. ix. They were deceived by the simulation of the Gibeonites, but it did not follow that Joshua and the Israelites, if they knew that they were neighbours, would not have spared them. For

dixerant Gabaonitis: *fortassis in medio mei habitas, quomodo tecum paciscerer?* hunc habere sensum potest, ut interrogentur Gabaonitæ quale pactum desiderent, sociale an deditionis; aut etiam ut ostendant Hebræi licitum sibi non esse cum quibusdam populis fœdus inire sociale: non etiam ut negent dedentibus se vitam relinqui posse. Lex enim divina, quæ eos populos internecioni devovebat, [n]ex legis
Deut. xx. 10. alterius comparatione ita erat intelligenda, ut locum haberet nisi si qui moniti statim facerent imperata. Quod inter alia
Jos. ii. probat historia Rahabæ, [o]cui ob bene merita parcitum est, et
1 *Reg.* ix. 21. Solomonis, qui Cananæorum reliquias sub imperium ac tributum accepit.

xi. 19, 20. 3 Atque huc pertinet quod in Josuæ libro dicitur, nullam fuisse civitatem ex populis septem quæ pacem fecerit; obduratos enim ne gratia illis fieret. Quare cum credibile esset, si rem ipsam Gabaonitæ indicassent, quod præ metu non fecerunt, tamen vitam salvam sub parendi conditione impetraturos fuisse, valuit jusjurandum, adeo quidem, ut et de

[n] *Ex legis alterius comparatione*] Imo et ex causa legi de internecione addita. Exodi xxiii. 33. Deut. vii. 4. cessat enim ea causa in illis qui præcepta filiorum Noæ suscipiunt, et tributa pendunt. Ita Maimonides, et Samson Micosi, et Moses de Kotzi, in præcepto jubente XV. et CXVIII.

[o] *Cui ob bene merita parcitum est*] Et Gazere habitantium in historia Josuæ xvi. 10. Gergesæos ad Christi usque tempora superstites fuisse ex evangelio apparet Matth. viii. 28. nam hi ab initio se dediderant: ideo omittuntur in hostium enumeratione. Deut. xx. 17. Jos. ix. 1.

[p] *Ambrosius*] *De Officiis*, III. c. 10.

[q] *Personali cuidam servituti*] Ut Bruttiani olim a Romanis. Gellius x. 3. Festus verbo Brutiani.

[4] Hæc fuisset mera cavillatio, si juramentum, in se spectatum, validum

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what they said, ver. 7, *Peradventure ye dwell among us, and how shall we make a league with you?* may be understood as an inquiry whether the Gibeonites asked for a league of equality or of submission; or that they might shew that it was not lawful for the Hebrews to make leagues with certain peoples; not to imply that they would not spare their lives if they surrendered. For the divine law, which devoted those peoples to destruction, was to be understood by comparison with the rest of the law, in such sense that it was to take its course except any one attended to the warning, and did what was commanded them. This appears in the history of Rahab, who was spared; and of Solomon, who put the remainder of the Canaanites under a tribute of bond-service.

3 And to this view belongs what is said in the book of Joshua, xi. 19, 20, that none of the seven cities of Canaan made peace, for God had hardened their hearts that they might have no favour; wherefore

eo violato postea pœnæ sumtæ sint gravissimæ Deo auctore. [p]Ambrosius hanc tractans historiam: *Josue tamen pacem quam dederat revocandam non censuit, quia firmata erat sacramenti religione, ne, dum alienam perfidiam arguit, suam fidem solveret.* Nihilominus doli sui pœnam aliquam sustinuerunt Gabaonitæ, jam sua deditione subditi facti Hebræorum. Addicti enim sunt [q]personali cuidam servituti, cum si egissent aperte, potuissent ad tributariam conditionem recipi. 2 Sam. xxi. 6.

V. Non tamen ultra receptum loquendi morem extendenda est juramenti significatio. Ideo perjuri non erant qui cum [4]jurassent non daturos se in matrimonium filias Benjaminitis, raptas cum raptoribus vivere permiserunt. [r]Aliud enim est dare, aliud amissum non repetere. Ambrosius de hoc facto: *Quæ indulgentia congruo intemperantiæ supplicio non videtur vacare, quando illis hoc solum permissum est ut raptu inirent conjugia, non connubii sacramento.* Non dissimile est quod Achæi, Romanis quædam non probantibus De Offic. iii. 14.

fuisset. At vero et hoc, et alia omnia *comminatoria Juramenta*, quum ex illis nemini jus quæratur, et plerumque animo præ ira non satis sui compote fiant, nullam aliam obligationem, nisi seriæ pœnitentiæ, post se trahunt. Vide quæ scripsimus in dictum caput PUFENDORFII nostri, § 13. *J. B.*

[r] *Aliud est dare, aliud amissum non repetere*] Οὔτε προτρεπομένων, οὔτε κωλυόντων, ait in hac historia Josephus (*Antiq. Jud.* v. 2. § 12. *Edit. Huds.*) *Nec hortabantur Israëlitæ, nec prohibebant.* Seneca Excerptorum VI. 2. *Lex cum tenet qui juvat exulem, non qui patiatur juvari.* Symmachus: *Inanem metum divino animo vestro tentat incutere, si quis asserit conscientiam vos habere præbentium, nisi detrahentium subieritis invidiam.* (Lib. X. Ep. 54.)

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it is probable that if the Gibeonites had stated the actual fact, they would have obtained their lives on condition of submission; the oath therefore was good. So much so, that God inflicted heavy punishment for the violation of it. 2 Sam. xxi. 6. So Ambrose maintains this oath. And the Gibeonites were punished for their deceit with personal servitude, whereas, if they had acted openly, they might have escaped on condition of paying a tribute.

V. But the signification of an oath is not to be extended beyond the received usage of speech. Therefore those were not perjured, Judges xxi. 7, who, when they had sworn that they would not give their daughters to wife to the tribe of Benjamin, still permitted them to live with those who had taken them by violence. For it is one thing to give, another, not to ask back rigorously. So Ambrose. Not dissimilarly the Achæans, when the Romans were dissatisfied with something which they had done and sworn to, requested the Romans

quæ ab ipsis facta et jurejurando firmata erant, rogarunt ut
Liv.xxxix.37. ipsi Romani quæ viderentur mutarent, nec Achæos religione obstringerent irrita ea quæ jurejurando sanxissent faciendi.

VI. Ut valeat juramentum, [s] oportet obligatio sit licita. Quare nullas vires habebit jurata promissio de re illicita, aut naturaliter, aut divina interdictione, aut etiam humana, de qua mox agemus. Bene [t] Philo Judæus: ἴστω δὲ πᾶς ἐνωμότως ἄδικα δρῶν, ὅτι εὐορκήσει μὲν οὔ, τὸν δὲ πολλῆς φυλακῆς καὶ ἐπιμελείας ἄξιον ὅρκον ἀνατρέπει, ᾧ τὰ καλὰ καὶ δίκαια ἐπισφραγίζεται. προστίθεται γὰρ ὑπαίτια ὑπαιτίοις, ἐν οὐ δέοντι γινομένοις ὅρκοις, οἷς πολὺ βέλτιον ἦν ἡσυχάζεσθαι, πράξεις παρανόμους. ἀπεχόμενος οὖν τοῦ ἀδικοπραγεῖν, ποτνιάσθω τὸν Θεὸν ἵνα μεταδῷ τῆς ἵλεω δυνάμεως αὐτῷ συγγενοῦς, ἐφ' οἷς ἀβουλίᾳ χρησάμενος ὤμοσε. διπλάσια γὰρ αἱρεῖσθαι κακὰ, δυνάμενον τὴν ἡμίσειαν αὐτῶν ἀποφορτίσασθαι, μανία καὶ φρενοβλάβεια δυσίατος· *Sciat quisquis ob juramentum injusti aliquid molitur agere, non se jurisjurandi observantem fore, sed potius eversorem jurisjurandi, quod magna cura ac religione dignum est, et quo honesta ac recta sanciri solent. Addit enim culpam culpæ, juramento non recte facto, et quo abstinere satius fuerat actum illegitimum. Quare ab injusta actione abstinens Deum veneretur, ut quæ ipsi est maxime propria, misericordiam [et temerarii juramenti veniam] ei impertiat. Nam dupla eligere mala, cum parte altera exonerari possis, insanabilis est furor, et*
1 Sam. xxv. *mentis inopia.* Exemplum dari potest in Davide, qui Nabali pepercit quem se occisurum juraverat. Cicero simile ponit
Lib. xi. 11. exemplum in voto Agamemnonis, Dionysius Halicarnassensis

[s] *Oportet obligatio sit licita*] Tractat hoc bene Ambrosius *de Offic.* I. et alii relati in causæ XXII. quæstionem IV. Pertinet huc canon VII. concilii Hilerdensis relati in tomum III. conciliorum Galliæ; et in Hincmari opusculis non pauca.

[t] *Philo*] *De specialibus Legibus,* (pag. 771. *Edit. Paris.*)

[u] *Augustinus*] *De Bono Conjugali* c. 4. citatur dicta quæstione. (cap. 20.) Vide et Gailium, *de Pace Publica,* Lib. I. c. IV. § 16. et *de Alboino Historiam,*

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to change it themselves, and not to ask them to make void what they had sworn to uphold.

VI. That an oath may be valid, the obligation must be lawful. Wherefore there is no force in a sworn promise concerning a thing unlawful, either by Natural Law, or Divine Prohibition, or Human, of which we shall speak afterwards. So Philo Judæus. Thus David spared Nabal, whom he had sworn to kill. Cicero mentions, as an example, Agamemnon's vow; Dionysius, the conspiracy of the de-

in conjuratione decemvirorum de republica occupanda. Seneca: *Herc. Oet.* v. 480.

Præstare fateor posse me tacitam fidem,
Si scelere careat: interim scelus est fides.

Ubi *interim* valet *interdum*. Ambrosius: *est enim contra* *Offic.* i. c. *ult.* *officium nonnunquam solvere promissum, sacramentum custodire.* [u]Augustinus: *si ad peccatum admittendum fides exhibeatur, mirum est si fides appellatur.* Idem docet secunda ad Amphilochium Basilius.

VII. 1 Imo etiamsi res quæ promittitur non sit illicita, sed [x]majus bonum morale impediens, sic quoque non valebit jusjurandum: quia scilicet profectum in bono Deo debemus, ita ut ejus libertatem eripere nobis ipsis non valeamus. Huc pertinet insignis ejus quem dixi Philonis Judæi locus, quem ad- *Ubi supra.* scribere non pigebit: εἰσὶ δ' οἱ τὴν φύσιν ἄμικτοι καὶ ἀκοινώνητοι δι' ὑπερβολὴν μισανθρωπίας γεγονότες, ἢ καὶ ὑπ' ὀργῆς οἷα χαλεπῆς δεσποίνης ἐκβιασθέντες, ὅρκῳ τὴν ἀγριότητα πιστοῦνται τῶν ἠθῶν, οἵτινες οὔ φασιν ὁμοτράπεζον ἢ ὁμόροφον ἕξειν τὸν δεῖνα, ἢ πάλιν τῷ δεινὶ μὴ παρέξειν ὠφέλειάν τινα ἢ παρ' ἐκείνου τινὰ λήψεσθαι, καὶ μέχρι τελευτῆς· *sunt quidam adeo duro atque insociabili ingenio, sive odio humani generis, sive dura domina iracundia subacti, ut morum feritatem jurejurando obfirment, ut ne hunc habeant mensæ aut tecti socium, ne illi bene unquam faciant, ne quid ab eo ad mortem usque accipiant.* Quod ait jurasse quosdam [y]ne huic vel illi unquam bene facerent, id Hebræi vocabant נדר הנאה, id est, εὐχὴν ὠφελείας, *vocem de beneficentia:* שבע להטיב Lev. v. 6. Hujus formula tradentibus Hebræorum magistris erat קרבן כל מה דתהנה מני, aut קרבן שאתא נהנה לי,

apud Paulum Warnefredi, Lib. II. c. 27.

[x] *Majus bonum morale impediens*] Quale Honorii *de Pace* nunquam facienda cum Alarico, Zozimo narrante, (Lib. V. cap. 49. *Ed. Cellar.*) Vide c. inter cetera 22. dicta jam quæstione, et concilium Hilerdense in tomo III. conciliorum Galliæ canone 7. Hincmarum quoque dicto opusculo ad interrogationem XIV. libro de divortio ad interrogationem VI. et XIV.

[y] *Ne huic vel illi unquam bene facerent*] Vide Baba Kama, cap. IX. § 10. et ibi notata a doctissimo Constantino.

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cemvirs. So Seneca, Ambrose, Augustine, Basil.

VII. 1 Even if the thing promised be not unlawful, but something impeding a greater moral good, the oath will not be valid: because we are bound by God to aim at a moral progress; so that we may not take this liberty for ourselves. So Philo Judæus, of persons who in anger, &c. swear that they will not change their minds, or do good to this or that man. The forms of such oaths occur in Hebrew. [See.]

cui convenit illa Syriaca in veteri versione Matthæi xv. 5. קרבני מדם דתתהנא מני: græce δῶρον, ὃ ἐὰν ἐξ ἐμοῦ ὠφεληθῇς, id est, *donum Deo dicatum sit,* (id enim est קרבן κορβᾶν) *si quid unquam a me boni acceperis.*

2 Votum, addita consecrationis pœna, validum plane censebant Hebræorum magistri, pessimi hac in parte juris divini interpretes, etiamsi adversus parentes factum esset: quod dicto loco refellit Christus, in cujus verbis τιμᾷν honorare est benefacere, ut collato Marci loco apparet; et Pauli 1 Tim. v. 3, 17, et Num. xxiv. 11. Sed etiamsi adversus alios conceptum sit, recte dicemus non obligare jusjurandum, quia, ut diximus, profectui adversum est.

Thom. 2, 2. 89. art. 7, et *ibi* Cajet. Grat. *c. ult.* § *ult. c.* 22. q. 4.

Soto, vii. q. 1. art. 3. circ. 2.

VIII. De impossibilibus dicere nihil attinet. Satis enim manifestum est ad omnino impossibile neminem obligari.

IX. De eo vero quod pro tempore aut ex suppositione est impossibile, in pendenti esse obligationem, ita ut is qui ex suppositione juravit, operam quam potest dare debeat, ut quod juravit possibile reddat.

X. Forma jurisjurandi verbis differt, re convenit. Hunc enim sensum habere debet, ut Deus invocetur, puta hoc modo: *Deus testis sit,* aut, *Deus sit vindex,* quæ duo in idem recidunt. Nam cum superior puniendi jus habens [z] testis advocatur, simul ab eo perfidiæ ultio poscitur: et qui scit omnia

[z] *Testis advocatur, simul ab eo perfidiæ ultio exposcitur*] Ambrosius ad Valentinianum Imperatorem, (Lib. v. Epist. 30) *quid est jurare, nisi ejus quem testare fidei tuæ præsulem, divinam potentiam confiteri?* vide formulam insignem Chagani Avarorum apud Menandrum excerptis legationum. (Cap. 21).

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2 A vow of anything to God that another might not have it, was held valid by the Hebrew masters, even against parents; which Christ condemns. Even if the vow be against others it is not binding, because it is opposed to our moral progress.

VIII. Oaths concerning things impossible we need not speak of: for no one can be compelled to do what is impossible.

IX. As to what is for the time or by supposition impossible, the obligation is suspended; so that he who has sworn on the supposition, ought to do all that he can, that he may render possible what he has sworn.

X. The Forms of Oaths differ in words, agree in substance. They ought to have this meaning, that God is called upon, suppose in this way: *May God be my witness;* or, *May God be my Judge;* which two forms come to the same thing. For when a superior, having the right of punishing, is called in as a witness, he is also called upon to

ultor est, ideo quia testis. Plutarchus: πᾶς ὅρκος εἰς κατάραν τελευτᾷ τῆς ἐπιορκίας· *omne jusjurandum in diras desinit, si quis pejeraverit.* Huc pertinent fœderum formulæ antiquæ, quibus mos erat victimas adhiberi, ut apparet Gen. xv. 9, et sequentibus. Ut illa Romana apud Livium: *tu Jupiter ita illum ferito ut ego hunc porcum.* Et alibi: *Deos precatus ita se mactarent quemadmodum ipse agnum mactasset.* Et apud Polybium ac Festum: *si sciens fallo, ita me Diespiter ejiciat ut ego hunc lapidem.* *Quæst. Rom.* 44. Lib. i. 24. Lib. xxi. 45. *Hist.* iii. 25. *Voce* Lapis.

XI. 1 Sed et nominatis rebus personisve aliis jurari mos est vetus, sive quod illas sibi noxias imprecabantur, ut solem, terram, cœlum, principem, sive quod in illis puniri deposcebant, ut in capite, in liberis, in patria, in principe. Neque profanarum tantum gentium his mos, sed et Judæorum, ut idem ille [a] Philo nos docet. Ait enim non debere juraturos ob rem quamvis statim ἐπὶ τὸν ποιητὴν καὶ πατέρα τῶν ὅλων ἀνατρέχειν, *ad rerum omnium auctorem ac parentem procurrere,* sed jurare per parentes, cœlum, terram, universum: cui simile est quod Homeri interpretes notant, Græcos illos veteres non solitos προπετῶς κατὰ τῶν Θεῶν ὀμνύειν, ἀλλὰ κατὰ τῶν προστυγχανόντων, *facile per Deos jurare, sed* [b] *per res alias præsentes:* ut per sceptrum, idque ipsum a justissimo rege Rhadamantho fuisse constitutum tradit Porphyrius, Eustath. *ad Iliad.* i. v. 234. *De Abst.* iii. p. 285.

[a] *Philo*] De specialibus legibus, (pag. 770 A. B.)

[b] *Per res alias*] De Socrate Apollonius apud Philostratum VI: ὤμνυ ταῦτα, οὐχ' ὡς θεούς, ἀλλ' ἵνα μὴ θεοὺς ὤμνυ· *Jurabat per ista, non ut per Deos, sed ne per Deos juraret* (c. 19.)

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punish perfidy: and He who knows all things is the Avenger, because he is the Witness. Plutarch says every Oath ends in imprecations on the false swearer. To this view belonged the ancient forms of leagues, in which victims were slain: of which see the meaning in the passages quoted. So Abram's sacrifice, Gen. xv. 9.

XI. 1 But it is also an old custom to swear, mentioning other things or persons, either as imprecating harm from them, as the sun, the earth, heaven, the prince; or as calling to be punished in them, as one's head, children, country, prince. And this was done not only by the heathen, but by the Jews; as Philo shews. He says that those who are going to swear, ought not forthwith to go up to the Creator and Father of all, but to swear by parents, heaven, earth, the universe. And so Eustathius notes that the ancient Greeks did not commonly swear by the Gods, but by other things present; as by the sceptre; and this was instituted by Rhadamanthus. [See.] So Joseph swore

In Aves, v. 521. et ad Aristophanem Scholiastes. Sic Josephus per salutem *Gen.* xlii. 15. Pharaonis jurasse legitur, ex more apud Ægyptios recepto, *2 Reg.* ii. 2. quem ibi notat Abenesdras; [c]Elisæus per vitam Eliæ. Neque vero Christus Matthæi v. ut quidam existimant, hæc juramenta vult minus esse licita quam quæ expresso Dei nomine fiunt: sed cum Hebræi ea minus curarent, opinione quadam non dissimili illius qui dixit, [5]*Sceptrum non putat esse Deos*, ostendit et hæc esse vera juramenta. Nam et Ulpianus optime dixit: *L. 33. D. de Jurejur.* *Qui per salutem suam jurat, Deum jurare videtur*, [d]*respectu* *Matth.* xxiii. 21. *enim divini Numinis jurat.* Sic Christus ostendit eum qui templum jurat, Deum jurare qui templo præsidet; et qui cœlum, Deum qui cœlo velut insidet.

2 At Hebræi magistri istorum temporum existimabant, non obstringi homines juramentis per res conditas factis, nisi adjecta pœna, ut si res, de qua jurabatur, Deo consecraretur. Hoc enim est juramentum κορβᾶν, sive ἐν τῷ δώρῳ, cujus non dicto tantum Matthæi loco, sed in Tyriorum quoque legibus *Lib. i. pp. 1046, 1047. § 22. p. 453.* mentio exstabat, ut ex Josephi contra Appionem disputatione

[c] *Elisæus per vitam Eliæ*] Adde II. Regum iv. 30. Cant. ii. 7.

[5] Ovidii est, *Remed. Amor.* vers. 784. *J. B.*

[d] *Respectu enim divini Numinis jurat*] Ita et Gratianus causa XXII. quæstione 1.

[6] Verisimilis non videtur mihi illa etymologia. Neque enim sat noti erant Græcis veteres Judæi, ut a nomine juramenti apud hos usitati illi petere potuerint vocem, qua uterentur ad omnes Orientis populos designandos: et longe ante tempus juramenti illius introducti, vox Καρβάνοι in usu erat, quum reperiatur apud Æschylum, ab Auctore ipso laudatum. In Euripide tamen, quem idem indicat, non reperio: neque illam notavit in Indice suo Barnesius, ceteroquin diligentissimus. Videtur Auctor cum isto Poeta confudisse alium recentiorem, cujus locus adfertur in Lexicis, Lyco-

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by the life of Pharaoh, following the Egyptian custom; and Elisha to Elijah, *As thy soul liveth*, 2 Kings ii. 2.

And Christ, in Matth. v., does not, as some suppose, teach that these oaths are less lawful than those in which God's name is expressed, but that they were true oaths, though the Hebrews thought more lightly of them. As Ulpian says, that he who swears by his own salvation, swears by God; so Christ taught that he who swears by the temple, or by heaven, swears by God.

2 The Hebrew teachers of that time held that men were not bound in oaths in which they had sworn by created things, except the thing sworn by, were, as a penalty, vowed to God. This is the oath of *Corban*, which is not only mentioned in Matthew, but also was known to the Tyrians, as we learn from Josephus against Appion. And hence I suppose the oriental peoples were called *Karbani*, as in Æschylus

discimus: nec aliunde arbitrer Orientis populos [6] dictos Græcis *καρβάνους*, quæ vox apud Æschylum et Euripidem exstat: *καρβᾶνα δ' αὐδὰν*, apud eundem Æschylum. Huic errori dicto loco Christus occurrit. Christianos veteres Tertullianus jurasse ait per salutem principis omnibus geniis augustiorem. Apud Vegetium formula est, cujus et supra meminimus, qua Christiani milites jurant non per Deum tantum, sed et per majestatem Imperatoris, quæ secundum Deum humano generi diligenda est et colenda.

Apolog. c. 32.

Lib. ii. 5.

XII. Sed et [e] si quis per falsos Deos juraverit, obligabitur: quia quanquam sub falsis notis generali tamen complexione numen intuetur: ideoque Deus verus, si pejeratum sit, in suam injuriam id factum interpretatur. Et sanctos viros videmus non detulisse quidem unquam sub ea forma jusjurandum, multo minus ita jurasse, quod a Duareno [7] permitti miror; sed tamen si quibuscum negotium erat adduci non possent, ut aliter jurarent, contraxisse cum eis, ipsos quidem ut oportebat jurantes, ab illis autem juramentum accipientes

phronem dico. *J. B.*

[e] *Si quis per falsos Deos juraverit, obligabitur*] Liber Sapientiæ c. xiv. *οὐ γὰρ ἡ τῶν ὀμνυμένων δύναμις, ἀλλ' ἡ τῶν ἁμαρτανόντων δίκη ἐπεξέρχεται ἀεὶ τὴν τῶν ἀδίκων παράβασιν.* Quod ita vertit Latinus: *Non enim juratorum virtus, sed peccantium pœna perambulat semper injustorum prævaricationem*, (vers. ult.)

[7] Non id permittit Duarenus, sed tantum deferri juramentum illi, qui per Mahumetem, e. g. juraturus est. Vide JCtum illum, Tract. priore ad Tit. *De jurejurando*, cap. xi. Tom. I. Opp. *Ed. Lugd.* 1579. p. 235. et Tract. altero, cap. 4. pag. ii. Tom. II. Adde quæ notavimus in sæpius laudatum Caput PUFENDORFII, *De Jure Nat. et Gent.* § 4. Not. 2. Edit. secundæ. *J. B.*

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and Euripides*. Christ refutes this error.

Tertullian says that the ancient Christians swore by the Safety of the Prince. In Vegetius, as above stated, the formula is, By God and the Majesty of the Emperor, which, after God, is to be reverenced and honoured by men.

XII. Moreover he who swears by false gods is bound; because, though under false notions, he refers to the general idea of Godhead: and therefore the true God will interpret it as a wrong to himself if perjury be committed. We do not find that holy men ever proposed an oath in that way, much less that they swore such an oath, which I wonder that Duarenus permits†. But if those with whom they were

* Barbeyrac says, not in Euripides, but in Lycophron; and he questions the etymology of *Korbani*.

† Duarenus does not permit men to swear, but only to *accept* an oath by *Mahomet*. J. B.

August. *Epist. ad Publ.* 154. *Qui loc. citat. c. mov.* 16. *Caus.* 22. q. 1.

quale haberi poterat. Exemplum est in Jacobo et Labane Genes. xxxi. 53. [f]Hoc est quod ait Augustinus: *Et qui per lapidem jurat, si falsum jurat, perjurus est.* Deinde: *Non te audit lapis loquentem, sed punit Deus fallentem.*

vi. 16. *De Leg. Alleg.* Lib. ii. p. 99.

XIII. 1 Effectus juramenti præcipuus est præcidere controversias. Πάσης ἀντιλογίας πέρας εἰς βεβαίωσιν ὁ ὅρκος, inquit divinus scriptor ad Hebræos: *Omnis disputationis finis est juramentum rem sanciens.* Cui simile est illud Philoneum: ὅρκος μαρτυρία Θεοῦ περὶ πράγματος ἀμφισβητουμένου. *Dei testimonium est jusjurandum de re de qua ambigitur.*

Antiq. Rom. vi. 84.

Et illud non dissimile Halicarnassensis; τελευταία δὲ πίστις ἅπασιν ἐστιν ἀνθρώποις Ἕλλησί τε καὶ βαρβάροις, ἣν οὐδεὶς πώποτε ἀναιρήσει χρόνος, ἡ δι' ὅρκον καὶ σπονδῶν ἐγγυητὰς θεοὺς ποιουμένη τῶν συμβάσεων· [g]*Ultima fides inter homines tum Græcos, tum barbaros, quam nulla delebit ætas, est ea quæ per jurata pacta sponsores adhibet Deos.* Sic et Ægyptiis jusjurandum μεγίστη παρ' ἀνθρώποις πίστις, *maxima fides hominibus inter se.*

Diod. Sic. i. 77.

Apud Stob. *Serm.* 28.

2 Duo ergo debet jurans, primum, ut verba animo congruant, quod ἀληθορκεῖν vocat Chrysippus; alterum, ut fac-

[f] *Hoc est quod ait Augustinus*] Sermone XXVIII. *de verbis Apostoli;* citatur c. *Ecce dico:* 10. causa XXII. quæst. v.

[g] *Ultima fides*] Procopius *Persicorum* II. ὅρκους ὁ τῶν ἐν ἀνθρώποις ἁπάντων ὕστατόν τε καὶ ὀχυρώτατον εἶναι δοκεῖ τὴν εἰς ἀλλήλους πίστεώς τε καὶ ἀληθείας ἐνέχυρον· *Jusjurandum quod ab hominibus habetur omnibus ultimum atque firmissimum et fidei mutuæ et veracitatis pignus.* (Cap. 10.)

[h] Ψευδορκεῖν] Hoc ψευδορκεῖν vetatur Exodi xx. ἐπιορκεῖν Levitici xix. ut Hebræi volunt præcepto jubente CCXL.

[8] In *Juramentis obligatoriis,* Juramentum est tantum accessio quædam,

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dealing could not be brought to swear otherwise, they contracted with them, taking such an oath as was to be had, as Jacob from Laban, Gen. xxxi. 51. So Augustine says, He who swears by a stone, if he swear falsely, is perjured: not that the stone hears the speaker, but that God punishes the perjurer.

XIII. 1 The principal effect of an oath is to put an end to strife, as the writer to the Hebrews, vi. 16. So Philo, Dionysius, Diodorus.

2 Therefore the swearer must *swear sincerely,* so that his words agree with his thoughts, and *swear faithfully,* so that his deeds agree with his words: the violations of these duties we might call *false swearing* and *perjury,* but the distinction is not adhered to. [See the Greek words.]

XIV. And if the matter be such, and the words so conceived, that

tum congruat verbis, quod idem appellat *εὐορκεῖν*. Qui in illo peccat [h]*ψευδορκεῖν*, qui in hoc *ἐπιορκεῖν* eidem Chrysippo dicitur satis distincte, quanquam confundi interdum hæc solent.

XIV. Et si quidem materia talis sit, et verba ita concepta, ut non ad Deum tantum sed et ad hominem referantur, jus haud dubie homini ex ipso juramento quæretur, tanquam ex promisso aut contractu qui simplicissime intelligi debeat. Si vero aut verba hominem non respiciant jus ei conferendo, aut respiciant quidem, sed aliquid sit quod ei possit opponi, [s]tunc ea vis erit jurisjurandi, ut homo quidem ille jus nullum consequatur, at nihilominus qui juravit Deo obligetur stare jurejurando. Hujus rei exemplum est [i]in eo qui per metum injustum causam promissioni juratæ dedit. Nam hic jus nullum consequitur, aut tale quod reddere debeat, quia causam damno dedit. Sic videmus Hebræos reges et [k]a prophetis *Ezec.* xvii.
increpatos, et punitos a Deo, quod fidem juratam Babyloniis 12, 13, 15.
regibus non servassent. Laudat Cicero Pomponium tribunum qui servavit quod terrore coactus juraverat: *tantum*, inquit, *Offic.* iii. 31.
temporibus illis jusjurandum valebat. Quare non Regulus Tolet. iv. 22. *Offic.* iii. 2.
tantum redire in carcerem, ut maxime is fuerit injustus,

ad firmandam fidem promissorum. Adeoque ubi obligatio nulla est, tota vis jurisjurandi cadit. Vide quæ contra duplicem illam obligationem, quam Auctor sibi fingit, post PUFENDORFIUM, diximus, Capite jam sæpius laudato. Nonnulla etiam hac de re addidimus in Notis nostris Gallicis ad hunc locum. *J. B.*

[i] *In eo qui per metum injustum causam promissioni juratæ dedit*] Etiam vi extortum jusjurandum, ob Dei reverentiam servandum docet Augustinus epistolis CCXXIV. et CCXXV.

[k] *A prophetis increpatos*] Vide et Jerem. xxxix. 5.

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they refer not to God only but to a man also, [as if I swear to give you a thing,] then, undoubtedly, the man acquires a right by the oath, as from a promise or contract simply. But if the words do not regard a man as conferring on him a right, or regard him, but have something opposed to them; then the effect of the oath will be that the man will acquire no right; but he who has sworn to God will be obliged to stand by his oath. This is exemplified when one, by inspiring unjust fear, has given occasion to a sworn promise. So we see the Hebrew kings rebuked by the prophets, and punished by God, for not keeping their faith with the Babylonian kings. Cicero lauds Pomponius, who kept an oath given under terror: *such*, he says, *was the force of an oath at that time.* And hence Regulus was bound to return to his imprisonment, though unjust; and those ten whom Cicero mentions, to return to Annibal.

debuit; sed et decem illi quorum Cicero meminit, redire ad Annibalem: jusjurandum enim intercesserat.

Thom. 2, 2. 89. art. 7. et *ibi* Cajet. Alex. *Imol. in c. Ver. de Jurejur.* Soto, viii. q. 1. art. 7. *De Offic.* iii. 29.

XV. 1 Neque hæc tantum inter hostes publicos locum habent, sed inter quosvis: non enim persona sola respicitur cui juratur, sed [l]is qui juratur Deus, qui ad obligationem pariendam sufficit. Repudiandus ergo Cicero cum ait perjurium nullum esse, si prædonibus pactum pro capite pretium non adferatur, ne si juratum quidem sit: quia pirata non sit ex perduellium numero definitus, sed communis hostis omnium, cum quo nec fides esse debeat, nec jusjurandum commune. Quod et de tyranno dictum ab eodem est alibi, et a Bruto apud Appianum: *οὐδὲν πιστόν ἐστι Ῥωμαίοις πρὸς τυράννους, οὐδ' εὔορκον, cum tyranno Romanis nulla fides, nulla jurisjurandi religio.*

Civil. ii. p. 515.

2 Atqui sicut in jure gentium constituto differre hostem a pirata verum est, et a nobis infra ostendetur; ita hic ea differentia locum habere non potest, [m]ubi, etsi personæ jus deficiat, cum Deo negotium est: qua de causa juramentum voti [9]nomine nuncupatur. Neque id, quod sumit Cicero, verum est, nullam esse cum prædone juris societatem. Nam

[l] *Is qui juratur Deus*] Nicephor. Gregoras: *εἰς θεὸν ἡ ἐπιορκία τὸ τὴν περιφρονήσεως ἀνατίθησιν ἔγκλημα· perjurium Deo culpam impingit negligentiæ.* (Lib. x. pag. 227. *Ed. Col.* 1616.)

[m] *Ubi etsi personæ jus deficiat, cum Deo negotium est*] Plutarchus Lysandro: *ὁ ὅρκῳ παρακρουόμενος, τὸν μὲν ἐχθρὸν ὁμολογεῖ δεδιέναι, τοῦ δὲ Θεοῦ καταφρονεῖν· qui juramento hostem circumvenit, is ostendit a se hostem metui, Deum contemni.* (Pag. 437 c.)

[9] Improprie ita dicitur. Votum *fit*

XV. 1 And this is not only true between public enemies, but any parties: for respect is not had to the person to whom the oath is made, but to God by whom we swear; and this is sufficient to produce an obligation. Therefore Cicero is to be repudiated when he says that it is no perjury if we do not pay the price which we have promised to robbers for sparing our life, not even if we have sworn: because a robber is not an open enemy, having the rights of war, but a common enemy of all men: which also the same Cicero says elsewhere of tyrants, as does Brutus in Appian.

2 But though, in the Instituted Law of Nations, it is true that an enemy differs from a robber, as we shall shew below; yet this difference cannot have place when, though the right of the person fail, our business is with God: on which account an oath is called *a vow.* Nor is that true which Cicero assumes, that we have no common ground of rights with robbers: for that a deposit is to be restored when made by a robber, if the owner do not appear, is rightly ruled by Tryphoninus.

depositum ex ipso gentium jure [n]reddendum latroni, si dominus non apparet, recte a Tryphonino responsum est. *L. 31. D. Deposit.*

3 Quare probare non possum quod a quibusdam est traditum, eum qui prædoni quicquam promiserit, momentanea solutione posse defungi, ita ut liceat ei quod solvit recuperare. Verba enim in juramento quoad Deum simplicissime atque adeo cum effectu sunt intelligenda. Atque ideo qui redivit ad hostem clam, iterumque abiit, non satisfecit juramento de reditu, ut recte a senatu Romano judicatum est.

XVI. 1 Illud vero Accianum: *Apud Cicer. Offic. iii. 28.*

T. Fregisti fidem.
A. Quam neque dedi, neque do infideli cuipiam:

Ita demum probari potest, si jurata promissio aperte respectum habuerit alterius promissionis, [o]quæ ei quasi conditio fuerit implicita, non si diversi generis sint promissa, et citra respectum mutuum: tunc enim omnino servandum cuique erit quod ipse juravit. Atque hoc nomine Regulum laudans sic compellat Silius (Lib. VI. vers. 63, 64): *L. Siquis, 39. in fine. D. de Jurejur.*

Qui, longum semper fama gliscente per ævum,
Infidis servasse fidem memorabere Pœnis.

Deo: JURAMENTUM, *per Deum*, ait ipse Auctor, Adnot. in Numer. xxx. 3. Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. 2. § 8.

[n] *Reddendum latroni*] Et ei qui regnum sine jure invasit, quomodo Oroferni depositum redditum a Prienensibus. Polybius (*Excerpt. de Virt. et Vit.* p. 1470. *Ed. Amst.*) et Diodorus Siculus in excerptis Peiresianis, (p. 334.)

[o] *Quæ ei quasi conditio fuerit implicita*] C. pervenit, quod est III. *de Jurejurando.* Adde l. lege fundo, 5. in fine D. *de lege commissoria.*

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3 Wherefore I cannot approve what is delivered by some writers, that he who has promised anything to a robber may discharge his duty by a momentary payment, and be allowed forthwith to take back what he has paid. For words used in an oath, and so, towards God, are to be understood with entire simplicity; and therefore, so as to have effect. And therefore, he who returned to the enemy clandestinely and came away again, did not satisfy his oath that he would return, as was rightly judged by the Roman Senate.

XVI. 1 Are oaths to a faithless person not to be kept: as Accius, quoted in Cicero's *Offices*, holds?

Not if the sworn promise had evidently respect to another promise which was a sort of implied condition. But they are to be kept, if the promises are of a diverse kind, and without mutual reference: for then each must observe what he has sworn. And thus Regulus is praised by Silius for keeping faith with the faithless.

2 Inæqualitatem in contractibus naturaliter locum facere aut rescindendi aut reformandi contractus, supra diximus. Et quanquam jus gentium aliquid in hac re mutavit, jure tamen civili, quod inter ejusdem populi partes valet, rediri sæpe ad illud quod natura licebat, itidem supra monuimus. Sed hic quoque, si juramentum intercessit, etiamsi personæ nihil aut minus debeatur, Deo fides erit præstanda. Itaque Psalmorum scriptor, ubi viri boni virtutes enumerat, addit et hanc: *Juratus in damnum suum non tamen mutat*[1].

Auth. Sacrament. *C. Si adv. vend.* *Psal.* xv. 4.

XVII. Verum illud notandum est, quoties non personæ jus nascitur ex tali aliquo defectu, qualem diximus, sed Deo obstringitur fides, heredem ejus qui juravit non teneri. Quia ad heredem sicut bona transeunt, id est, quæ in hominum sunt commercio, ita bonorum onera: non item alia quæ quis ex officio puta pietatis, gratiæ, fidei debuit. Hæc enim ad illud quod stricte jus dicitur inter homines non pertinent: ut alibi quoque ostendere meminimus.

XVIII. Sed etiam ubi jus personæ non nascitur, si tamen juramentum utilitatem spectet alicujus, [p]atque is eam

[1] Alio modo Auctor videtur vertere verba illa in Adnotationibus suis ad hunc Psalmum; quas videre poteris. Sed et sequendo versionem, qualis heic exhibetur, nil est, quod suadeat agi de illis Promissis jurejurando firmatis, in quibus reperitur læsio, propter quam nulla essent, si jusjurandum abesset. Diximus in Notis Gallicis ad hunc locum. *J. B.*

2 That inequality in contracts, by Natural Law, gives ground either for rescinding or remodelling them, we have said above. And though the Law of Nations has changed something in this matter, we are often allowed by the Civil Law, which is of force over those who are parts of the same people, to return to the Natural Law. But here if an oath have been introduced, although nothing, or less than the contract, may be due to the person, our faith to God is to be kept. So Ps. xv. 4, *He that sweareth to his neighbour, and disappointeth him not, though it were to his own hinderance.*

XVII. But it is to be observed, that when there is no right of a person produced, in consequence of some of these defects, but only our faith engaged to God; the heir of the swearer is not bound. Because as the goods pass to the heir, that is, the things about which men deal, so do the burthens upon them: but not the obligations which any one was liable to, as duties of piety, kindness, or good faith. For these do not belong to what is strictly called *jus* or right, as we have shewn.

XVIII. So when a right is not acquired by a person, in virtue of another's oath, yet if the oath respect the utility of any one, and

nolit, non tenebitur qui juravit: [q]sicut nec tenebitur si cesset qualitas sub qua alicui juravit, ut si magistratus desinat esse magistratus. Apud Cæsarem libro II. *de Bello Civili*, Curio Domitii qui fuerant milites sic alloquitur: *Sacramento quidem vos tenere qui potuit, quum projectis fascibus et deposito imperio privatus et captus ipse in alienam venisset potestatem?* Et mox sacramentum ait capitis deminutione sublatum. Cap. 32.

XIX. Illud quæritur, an quod contra juramentum fit, illicitum sit tantum, an et irritum? qua de re distinguendum arbitror, ut si sola fides sit obstricta, valeat actus contra juramentum factus, puta testamentum, venditio: non valeat autem si ita conceptum sit jusjurandum, ut simul contineat abdicationem plenam potestatis ad actum. Et hæc quidem naturaliter jusjurandum sequuntur: ex quibus faciendum est judicium de regum juramentis, et his quæ exteri exteris jurant, quando actus ex loco subjectionem non accepit. c. *Dilect.* 25. *de Præb.* Covarr. *in d. c. Quam.* p. 2. §. 2. n. 10.

XX. 1 [r]Nunc quid superiorum, id est, regum, patrum, dominorum, et maritorum in his quæ maritalis sunt juris,

[p] *Atque is eam nolit*] Plautus *Rudente*: *Jurisjurandi rogo gratiam facias.* (v. 3. 58.)

[q] *Sicut nec tenebitur si cesset qualitas*] Similia vide in L. si duas § gentium D. *de excusat. tut.* et apud Gailium II. obs. cxliv. n. 8. et de Arrestis x. 9. et apud Azorium institutionibus moralibus v. 22. q. 6. parte I.

[r] *Nunc quid superiorum, id est, re-*

he will not have this utility, the swearer is not bound. Also he is not bound if the quality under which he swore has ceased. So in Cesar, Curio addresses those who had been Domitius's soldiers: *Who could hold you by an oath, when he himself, throwing away the ensigns of authority, and laying down his command, as a private man and a captive, has himself become subject to others?* And afterwards he says that their oath is rescinded by his degradation.

XIX. It is made a question whether that which is contrary to an oath is only unlawful, or also void.

For this we must distinguish: if good faith alone be engaged, an act done against the oath is valid; as a testament, a sale. But not, if the oath be so expressed that it contains at the same time a full abdication of power to do the act.

And these are the natural consequences of oaths; from which we must form a judgment of the oaths of kings, and the oaths which foreigners swear to foreigners, when the act is not necessarily subjected to the laws of the place.

XX. 1 Let us now consider what the authority of superiors, that is of kings, fathers, masters, husbands (in marital matters), can

imperia possint videamus. Superiorum actus hoc quidem efficere non potest, ut jusjurandum quatenus vere fuit obligatorium non sit præstandum: id enim juris est naturalis et divini. Sed quia actus nostri non plene sunt in nostra potestate, sed ita ut a superioribus dependeant, [2]ideo duplex esse potest actus superiorum circa id quod juratur, alter directus in personam jurantis, alter in personam cui juratur.

Thom. 2, 2. q. 89. art. 9.

2 In personam jurantis dirigi potest, aut antequam juretur irritum reddendo juramentum, quatenus jus inferioris sub potestate superioris continetur, aut postquam juratum est vetando ne impleatur. Nam inferior, qua inferior, obstringere se non potuit nisi quatenus superiori id placiturum esset: ampliorem enim non habebat potestatem. Hoc modo lege Hebræa mariti uxorum, patres liberorum qui sui juris nondum erant, juramenta irrita faciebant. Proponit hanc quæstionem Seneca: *Si lex lata erit, ne id quisquam faciat quod ego me amico meo facturum promiseram?* et solvit: *Eadem lex me defendit quæ vetat.* Sed et actus ex utroque mixtus esse potest, ut si superior constituat quod inferior juraverit

C. Venient. 19. de Jurejur. Feud. 2. 55. Princ. de Prohib. Feud. Alien. per Frid.

Lib. iv. *de Benef.* 35.

gum, patrum, dominorum, et maritorum in his quæ maritalis sunt juris, imperia possint videamus] Augustinus epistola CCXL. et CCXLI.

[2] Vide, præter § 24. dicti Capitis ii. Lib. IV. PUFENDORFII *De Jure Nat. et Gent.* ea, quæ observavimus ad libellum *De Officio Hom. et Civis*, Lib. I.

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do [in modifying the effect of oaths]. The act of a superior cannot effect that an oath, so far as it was obligatory, is not to be performed; for that it is to be so, is a matter both of Natural and of Divine Law. But because our acts are not fully in our power, but in such a way that they depend on superiors, therefore there may be a double act of a superior as to the matter sworn; one direct, on the person of the swearer, the other, on the person to whom the oath is made.

2 The act of the superior may be directed on the person of the swearer, either before swearing, rendering the oath void, in so far as the right of the inferior is subject to the superior; or after the swearing, forbidding that it be fulfilled. For the inferior, as inferior, was not able to bind himself except so far as it should please his superior; he had no further power. And thus by the Hebrew Law the husband might make void the vows of his wife. Seneca proposes this question: *If a law be made that no one shall do what I had promised my friend I would do, what then?* And he solves it, saying, The same law which *forbids me defends me.* But there may be a mixed act of both parties; as if the superior should direct that what the inferior shall swear in this or that case, say from fear or from weakness of judgment, shall be valid, only if he himself approves

hoc aut illo casu, puta ex metu, aut imbecillitate judicii, ita demum valere si ab ipso approbetur. Atqui ex hoc fundamento defendi possunt absolutiones juramentorum, quæ [s] olim a principibus, nunc ipsorum principum voluntate, quo magis cautum sit pietati, ab ecclesiæ præsidibus exercentur.

L. ult. ad mun. Molin. disp. 149. c. si vero. de Jurejur.

3 In personam ejus cui juratur actus dirigi potest tollendo ab eo jus quod ei partum est; aut etiam, si jus desit, vetando ne quid ex tali juramento accipiat: idque duobus modis, sive in pœnam, sive ob publicam utilitatem, ex vi supereminentis dominii. Atque hinc intelligi potest, si jurans non ejusdem sit ditionis cum eo cui juratur, quid aut hujus aut illius rectores possint circa jusjurandum. Ipse autem qui juratus aliquid promisit nocenti qua talis est, puta piratæ, non potest jus promisso quæsitum pœnæ nomine ob id ipsum ei auferre: quia tunc verba nullum haberent effectum, quod omnino vitandum est. Similique de causa compensari non poterit quod promissum est, cum jure quod ante erat controversum, si post motam controversiam inita pactio fuerit.

4 Potest et lex humana impedimentum quod certi gene-

cap. xi. § 6. not. 3. tertiæ et quartæ Editionis. *J. B.*

[s] *Olim a principibus*] Suetonius *Tiberio* 35. Sic et in Hispania diu usurpatum notat Ferdinandus Vasquius *de Success. Creat.* l. II. § 18. [Apud Vasquium nil tale reperio, nec in loco indicato, nec alibi. *J. B.*]

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of it. And on this ground may be defended the absolutions from oaths which were formerly granted by princes; and are now, by the consent of princes, for the sake of piety, granted by the governors of the Church.

3 The act of the superior may be directed on the person of him to whom the oath is made, by taking from him the right which he has thus acquired: or even, if he have no right, by forbidding that he receive anything in virtue of such oath: and that, in two ways, either as a penalty, or for public utility, in virtue of his Eminent Dominion. And hence it may be understood, if the swearer be not under the same subjection as the person sworn to, what the governor of each may do in respect to the oath.

*He who on oath has promised anything to a mischievous person, as such, as for instance a robber, cannot take from him the promised right on the ground of penalty: for then his words would have no effect, which is by all means to be avoided.

In like manner what is promised cannot be given as a compensation for a right which was in controversy before, if the agreement took place after the controversy began.

* These two rules refer to promises rather than oaths. W.

ris actibus posuerat, tollere, si juramentum aut qualecunque, aut certa forma accesserit: quod Romanæ leges fecerunt in iis impedimentis, quæ non directe publicam, sed privatam jurantis utilitatem spectant. Quod si fiat, valebit actus juratus eo modo quo naturaliter citra legem humanam fuerat valiturus, aut fidem tantum obstringendo, aut jus etiam dando alteri, pro diversa actuum natura, quæ alibi a nobis explicata est.

XXI. 1 Notandum hic est obiter, quod in Christi præceptis et apud Jacobum de non jurando dicitur, proprie non ad assertorium juramentum, [t]cujus apud Paulum Apostolum exempla exstant aliquot, sed ad promissorium futuri incerti pertinere. Ostendit hoc evidenter oppositio illa in verbis

Matt. v. 33. *Ep.* v. 12. Christi: *audistis dictum antiquis, non pejerabis, sed reddes Domino juramentum. Ego vero dico vobis, Ne jurate omnino.* Et ratio quam Jacobus adjicit: *μὴ εἰς ὑπόκρισιν πέσητε*, id est, *ne fallaces inveniamini:* nam eum sensum vox *ὑποκρίσεως* apud Hellenistas habet, ut apparet Job. xxxiv. 30; Matth. xxiv. 51, et alibi.

2 Idem evincit illud in Christi verbis, *ἔστω δὲ λόγος ὑμῶν, ναὶ ναὶ, οὒ οὔ*, quod sic Jacobus explicat, *ἤτω δὲ ὑμῶν τὸ ναὶ ναὶ, καὶ τὸ οὒ οὔ·* ubi manifeste est figura

Virg. *Ecl.* vii. 70. quam *πλοκὴν* rhetores vocant, ut in illo:

Ex illo Corydon Corydon est tempore nobis.

Ex Aquil. *Rom. Antiq. Rhet. Lat.* p. 19. Et in altero simili: *ad illum diem Memmius erat Memmius.*

t *Cujus apud Paulum Apostolum exempla exstant aliquot*] Rom. i. 9; ix. 1; II. Corinth. i. 23; xi. 31; Phil. i. 8; I. Thess. ii. 5; I. Tim. ii. 7.

3 Vide L. 39. § 1. D. *De Legat.* III. L. I. § 2. *De Verb. Obligat.* *J. B.*

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4 Human Law may take away the impediment which it had thrown in the way of certain acts, if an oath, either in general, or in a particular form, be introduced: which the Roman Law did in the case of those impediments which regard, not directly public utility, but the private utility of the swearer. And if this be done, the act so sworn will be valid in the same manner as it would, without the Human Law, have been valid by Natural Law; either only by binding good faith, or by giving a right to another, according to the different nature of such acts, as already explained.

XXI. 1 It is here to be noted in passing, that what is said in the precepts of Christ, and in St James, of not swearing, does not properly apply to an oath of assertion, of which there are some examples in St Paul himself, but to an oath of promise with regard to an uncer-

Nam prius *ναὶ* et *οὐ* promissum significat, posterius ejus implementum. Est enim *ναὶ* promittentis: unde per *ἀμὴν* explicatur Apoc. i. 7, eundemque sensum habet quod hic in Syriaco est, אין respondens Rabbinico הין et Arabicum نعم, quomodo apud jurisconsultos Romanos *μάλιστα*[3], et quidni? notæ sunt respondentis ad stipulationem. Pro implemento promissionis sumitur apud Paulum 2 Corinth. i. 20, cum ait omnia Dei promissa in Christo esse *ναὶ καὶ ἀμήν.* Hinc vetus Hebræorum dictum, [4] *justi hominis ναὶ est ναὶ, et non est non.*

3 Contra, quorum facta a dictis discrepant, apud eos esse dicitur *ναὶ καὶ οὐ*, 2 Corinth. i. 18, 19, id est, *ναὶ* eorum esse *οὐ*, et *οὐ* esse *ναὶ*. Sic Paulus Apostolus ipse exponit: nam cum negasset se *ἐλαφρίᾳ χρήσασθαι, levitate usum*, addit sermonem suum non fuisse *ναὶ καὶ οὐ*. Festus varias referens sententias de significatione vocis *naucum*, sic scribit: *quidam* (aiunt) *ex græco* [u] *ναὶ καὶ οὐχὶ levem hominem significari.* Quod si *ναὶ καὶ οὐ* levitatem significat, sequitur, *ναὶ ναὶ, οὐ οὐ*, constantiam significet.

4 Idem ergo dicit Christus quod [x] Philo: *κάλλιστον καὶ* De Decal. p. 756 c.
βιωφελέστατον καὶ ἁρμόττον λογικῇ φύσει τὸ ἀνώμοτον, οὕτως ἀληθεύειν ἐφ' ἑκάστου δεδιδαγμένῃ, ὡς τοὺς λόγους ὅρκους εἶναι νομίζεσθαι· Optimum atque utilissimum et rationali naturæ convenientissimum est juramento abs-

[4] Reperitur apud Buxtorfium, *Florileg.* pag. 329. *J. B.*

[u] *Ναὶ καὶ οὐχὶ*] Recte in hoc Festi loco scripseris *οὐκί*, ut sæpe apud Homerum: id enim ad vocem nauci propius accedit.

[x] *Philo*] De decalogo.

tain future. This plainly appears in the words of Christ, Matth. v: and in the reason which St James adds, v. 12, *lest ye fall into condemnation, ὑπόκρισιν*, is, *lest ye be found fallacious.* See the passages.

2 The same is proved by the words of Christ, *Let your words be yea, yea, and nay, nay:* which St James explains, *Let your yea be yea, and your nay, nay:* that is, let your *yea* mean a sincere consent, and your *nay* a resolute refusal. See the illustrations.

3 On the contrary, those whose acts are at variance with their words are those whose word is *yea and nay*, 1 Cor. i. 18, 19, that is, their *yea* is *nay*, and their *nay* is *yea:* as St Paul himself explains. See Festus's etymology of *naucum.*

4 Therefore Christ said the same thing as Philo, that the best thing is that our word should be as our oath. So the Essenes, according to Josephus.

tinere, atque ita se veracitati assuefacere, ut verba pro juramento accipiantur. [y] Et alibi: ὁ τοῦ σπουδαίου λόγος ὅρκος ἔστω βέβαιος, ἀκλινὴς, ἀψευδέστατος· *Viri boni oratio pro juramento sit firmo, immutabili, fallere nescio:* et quod de Essenis Josephus: πᾶν τὸ ῥηθὲν ὑπ' αὐτῶν ἰσχυρότερον ὅρκου, τὸ δὲ ὀμνύειν αὐτοῖς περιΐσταται· *Quicquid dixerint validius est jurejurando: ac supervacua res ipsis habetur jurare.*

Antiq. Jud. ii. 7. p. 786 c.

5 Ab Essenis, aut Hebræorum illis quos secuti sunt Esseni, videtur hoc sumsisse [z] Pythagoras, cujus hæc sententia: μὴ ὀμνύναι Θεούς· ἀσκεῖν γὰρ αὐτὸν δεῖν ἀξιόπιστον παρέχειν· *non jurandum per Deos: quemque enim id curare debere,* [a] *ut nec jurato sibi credatur.* Scythæ de se ad Alexandrum Curtio referente: *Jurando gratiam Scythas sancire ne credideris: colendo fidem jurant.* Cicero pro Roscio Comœdo: *Quæ pœna a Diis immortalibus perjuro, hæc eadem mendaci constituta est. Non enim ex pactione verborum quibus jusjurandum comprehenditur, sed ex perfidia et malitia, per quam insidiæ tenduntur alicui, Dii immortales hominibus irasci et succensere consuerunt.* Solonis dictum celebratur: καλοκἀγαθίαν ὅρκου πιστοτέραν ἔχε· *Ea esto probitate, ut ei magis quam juramento cre-*

Diog. Laert. viii. 22.

Lib. vii. 8.

Cap. 16.

Apud Diog. Laert. i. 60.

[y] *Et alibi*] De specialibus legibus (pag. 769 c.)

[z] *Pythagoras*] Nam et Hermippus Pythagoricus Pythagoræ Philosophiam ab Hebræis ductam dicebat, teste Origene *contra Celsum.* (Lib. I. pag. 13. *Ed. Cant.*) Idem et Josephus Hebræus prodidit, et Jamblichus Pythagoricus. [Locus Josephi exstat Lib. I. *contra Apion.* § 22. *Edit. Oxon.* Verum probabile admodum est, legendum ibi non Ἰουδαίων, sed Ἰδαίων, ut conjecit Vir Eruditissimus J. Clericus, Tom. x. *Biblioth. Selectæ,* pag. 162, *et seqq.* Quod spectat Jamblichum, voluit Auctor dicere Porphyrium: hic enim ex Diogene lib. *de Incredibilibus* refert, Pythagoram, inter alios, Hebræos etiam invisisse, et ab iis hausisse quædam Philosophiæ suæ dogmata, *de Vita Pythag.* § 11. *Ed. Kusteri.* Apud Jamblichum autem nil tale reperitur. *J. B.*]

[a] *Ut nec jurato sibi credatur*] Philo (*De Decal.* pag. 756 c.) Ἤδη γὰρ ὅγε ὀμνὺς εἰς ἀπιστίαν ὑπονοεῖται· *Jam enim is, a quo jusjurandum exigitur, perfidiæ est suspectus.* Sophoclis *Œdipode Coloneo* dixerat Œdipus:

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5 Pythagoras seems to have taken this from the Essenes, or those who followed the Essenes. His precept is, *Not to swear by the gods, for you ought to act so that men believe you without an oath:* so the Scythians in Curtius: so Cicero for Roscius; Solon; Clemens Alexandrinus; Alexis the Comic Poet. Cicero relates that at Athens, when a certain man, noted for his holiness and gravity, had to give his testimony, and approached the altar to swear, the judges with one

datur. Clemens quoque Alexandrinus dixit viri boni esse, τὸ πιστὸν τῆς ὁμολογίας ἐν ἀμεταπτώτῳ καὶ ἑδραίῳ δεικνύειν βίῳ τε καὶ λόγῳ· *Fidem promissi ostendere in verborum ac vitæ stabilitate et constantia.* Alexis Comicus: Strom. vii. 8. Apud Stob. Serm. 27.

Ὅρκος βέβαιός ἐστιν ἂν νεύσω μόνον.

Nutus mei pro jurejurando valent.

Narrat Cicero oratione pro L. Cornelio Balbo, Athenis cum quidam apud eos qui sancte graviterque vixisset, et testimonium publice dixisset, et jurandi causa ad aras accederet, una voce omnes judices ne is juraret reclamasse; eo quod nollent religione videri potius quam veritate fidem esse constrictam.

6 A Christi dicto non discrepat Hieroclis illud ad aureum carmen: ὁ σέβου ὅρκον ἐν ἀρχῇ παραγγείλας, τὴν ἀποχὴν τοῦ ὀμνύναι προστάττει περὶ τῶν ἐκδεχομένων, καὶ ἀόριστον τῆς ἐκβάσεως ἐχόντων τὸ πέρας. ταῦτα γὰρ καὶ μικρὰ καὶ μεταπίπτοντα, διὸ οὔτε ἄξιον ἐπ' αὐτοῖς ὀμνύναι, οὔτ' ἀσφαλές. *Qui in principio dixerat, Jusjurandum reverere, eo ipso præceperat abstinere a jurando de his* [b] *quæ possunt fieri et non fieri, et incertum habent casus exitum. Talia enim et parvi ducenda sunt, et* p. 164.

Οὔτοι σ' ὑφ' ὅρκου γ' ὡς κακὸν πιστώσομαι.
Nolo te adigere jurejurando ut malum.

respondet Theseus:

Οὔκουν πέρα γ' ἂν οὐδὲν ἢ λόγῳ φέροις.
Nec plus haberes inde quam vocis sonum.

(Vers. 642, 643.)

M. Antoninus in viri boni descriptione: μήτε ὅρκου δεόμενος· *nec opus habens jurejurando,* (Lib. III. § 5.) Chrysost. *de Statuis* XV. εἰ μὲν πιστεύεις ὅτι ἀληθής ἐστιν ὁ ἀνὴρ, μὴ ἐπαγάγῃς τοῦ ὅρκου τὴν ἀνάγκην. εἰ δὲ οἶδας ὅτι ψεύδεται, μὴ ἀναγκάσῃς ἐπιορκεῖν· *Si credis veracem esse eum, quicum tibi negotium est, noli ei jurisjurandi imponere necessitatem: quod si scis fore ut mentiatur, ne coge eum et pejerare.* (Tom. VI. pag. 566. *Edit. Savil.*)

[b] *Quæ possunt fieri et non fieri*] Bene hoc animadvertit Chrysostomus *de Statuis* [Orat. XIV. Tom. VI. pag. 553]: ὅτι κἂν μὴ συναρπασθεὶς, μηδὲ ἄκων, μηδὲ ἀγνοῶν τοῦτο πάθῃ, ὑπ' αὐτῆς τοῦ πράγματος φύσεως, καὶ ἑκὼν καὶ εἰδὼς ἀναγκασθήσεται ἐπιορκῆσαι πάντως· *Etiamsi non eveniat id tibi quod impetu abreptus, aut coactus, aut nec cogitans juraveris, ipsa negotii natura id interdum secum feret, ut et volens et sciens falsum jurasse deprehendaris.* Et

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voice refused to have the oath administered, his character being guarantee sufficient.

6 The maxims of Hierocles on the Golden Poem are not different, *He who said, Reverence an oath, by that very precept enjoined you to abstain from swearing with regard to future uncertain matters. About such it is neither worthy nor safe to swear.* So Libanius in praising the Christian Emperors: Eustathius on the Odyssee.

mutabilia sunt, unde nec dignum de iis jurare, nec tutum. Et Libanius in Christiani Imperatoris laudibus ponit: ἐπιορκίας τοσοῦτον ἀποστατῶν, ὥστε καὶ πρὸς τὰς εὐορκίας ἔχειν εὐλαβῶς· *a perjurio tantum abest, ut etiam vera*
Lib. xiv. v. 171. *jurare vereatur.* Eustathius ad illud Odysseæ Ξ: ἀλλ' ἤτοι ὅρκον μὲν ἐάσομεν· sic ait: οὐ χρεία ὅρκου ἐν τοῖς ἀδήλοις πρὸς βεβαίωσιν, ἀλλ' εὐχῆς πρὸς ἀποτέλεσμα· *In rebus incertis non ad asseverationem juramentum adhibendum, sed preces pro bono exitu.*

Can. in c. quer. de jurejur. XXII. Ideo multis in locis vice jurisjurandi repertum est, ut [c]fides datis dexteris, quæ erat πίστις βεβαιοτάτη
Diod. xvi. 43. παρὰ τοῖς Πέρσαις, *firmissimum apud Persas fidei vinculum,* aut alio quo signo obstringatur, ea vi, ut, ni impleatur promissio, promissor non minus detestabilis habeatur quam si pejerasset. Præcipue de regibus virisque principibus dictum est usitatissimum, fidem eorum pro jurejurando va-
Pan. *in c. ad aures. De his quæ vi vel met. caus.* Jas. *in* l. iii. § *Jur. D. de jurejur.* Myns. *obs.* 17. *Cent.* 1. Suet. c. 42. Plut. *in Eum.* p. 585 F. lere. Tales enim esse debent, ut cum Augusto dicere possint, [d]Bonæ fidei sum: et cum Eumene, vitam se potius posituros quam fidem: quo et illud pertinet Guntheri Ligurino [Lib. III. vers. 511]:

> Nudo jus et reverentia verbo
> Regis inesse solet, quovis juramine major.

mox: σφαλερὸν μὲν οὖν καὶ περὶ ἑαυτοῦ τινα ὀμνύναι. πολλὰ γὰρ ὑπὸ τὴν τῶν πραγμάτων περιστάσεως βιαζόμεθα· *Periculosum igitur etiam de suo actu jurare; multa enim nobis eripit ipsa rerum natura subjecta casibus.* (Pag. 554.)

[c] *Fides datis dexteris*] Meminere Eustathius *ad Odysseæ* Ω: Aristophanis Scholiastes ad *Nubes,* [vers. 81. Vide et in *Acharnens.* vers. 307. qui locus insignior est]: Diodorus Siculus (Libro XVI. c. 43): Crantzius *Saxonicorum* XI. 27. In c. *Ad aures,* 3. *de his quæ vi metusve causa,* æquantur juramentum et fides interposita.

[d] *Bonæ fidei sum*] De Evagora Salaminis rege Isocrates: ὁμοίως τὰς ἐν τοῖς λόγοις ὁμολογίας ὥσπερ τὰς ἐν τοῖς ὅρκοις διαφυλάττων. (Pag. 197 E. *Ed. H. Steph.*) Symmach. x. 19. *Nusquam major spes quam in bonorum principum sponsione.* Nicetas *de Alexio Isaaci fratre* Lib. III. Βασιλεῦσι παρὰ πᾶν ἕτερον εὐορκεῖν τιθέναι περὶ πλείστου χρέων· *Regibus jurisjurandi fides ante omnia alia ponenda est.* (Cap. 4.)

XXII. Hence, in many cases, instead of an oath, was introduced a practice that good faith should be confirmed by giving the right hand, or some other sign; with this implication, that if the promise was not fulfilled, the promiser was held no less detestable than if he had perjured himself. Especially it is a common saying, concerning kings and princes, that their word goes for their oath. For they ought to be such that they can say with Augustus: I am a man of good faith: and with

Laudat orationo pro Deiotaro Cicero C. Cæsaris dexte- Cap. 3.
ram, non in bellis et præliis, quam in promissis et fide firmiorem. Et heroicis temporibus sceptrum erectum pro regum jurejurando valuisse notatum Aristoteli. *Pol.* iii. 14.

Eumenes, that they would sooner forfeit their life than their word: as also Gunter says to Ligurinus.

Cicero in his oration for Deiotarus, praises Cesar by saying that his hand was as firm in pledging truth as in fighting battles. And in the heroic times, a sceptre was set up as the king's oath, as Aristotle notes.

CAPUT XIV.

DE EORUM QUI SUMMUM IMPERIUM HABENT PROMISSIS ET CONTRACTIBUS ET JURAMENTIS.

I. *Refellitur sententia statuens restitutiones in integrum ex jure civili venientes ad regum actus, qua tales sunt, pertinere: item regem ex juramento non teneri.*

II. *Ad quos regum actus leges pertineant, distinctionibus explicatur.*

III. *Jurejurando rex quando teneatur, aut non teneatur.*

IV. *Quatenus rex teneatur his quæ sine causa promisit.*

V. *Usus ejus quod de legum vi circa regum contractus dictum est.*

VI. *Rex subditis obligari naturaliter tantum, aut et civiliter, quo sensu recte dicatur.*

VII. *Jus quæsitum subditis licite quomodo auferatur:*

VIII. *Rejecta hic distinctio quæsiti ex jure naturali aut civili.*

IX. *Contractus regum an leges sint, et quando.*

X. *Quomodo ex regum contractibus teneantur omnium bonorum heredes.*

XI. *Quomodo ex iisdem contractibus obligentur qui in regnum succedunt:*

XII. *Et quatenus.*

XIII. *Beneficia regum quæ revocabilia sint, quæ non, distinctione explicatur.*

XIV. *Contractibus invasorum imperii an teneatur cujus erat imperium.*

I. 1 PROMISSA, contractus, et juramenta Regum, et qui alii iis pares jus in republica summum obtinent, peculiares habent quæstiones, tum de eo quod ipsis in actus suos licet, tum de eo quod in subditos, tum de eo quod in successores. Quod primum caput attinet, quæritur an ipse rex, ut subditos suos, ita se quoque restituere in integrum, aut contractum irritum facere, aut a jurejurando se exsolvere possit. Bodinus censet iisdem ex causis regem, [1] sive aliena

Lib. i. 8. p. 135.

[1] Non vult Bodinus, restitutionem illam Regis, sive qua Regis, sive qua Privati, fieri ex Legibus Civilibus, sed ex æquitate naturali, cujus beneficium Regi denegari sane iniquum esset. De re ipsa plura diximus in Notis nostris Gallicis ad hunc locum. *J. B.*

CHAPTER XIV. *Of the Promises, Contracts, and Oaths of Sovereigns.*

I. 1 The Promises, Contracts, and Oaths of Kings, and other persons who have like authority, give rise to peculiar questions, both as to the lawful power they have over themselves and their own actions, and that which they have over their subjects, and that which they have over their successors.

fraude ac dolo, sive errore circumventum, sive metu, restitui posse, ex quibus subditus restitueretur, tum in iis quæ ad jura majestatis imminutæ, tum in iis quæ ad privata commoda pertinent. Addit, ne jurejurando quidem teneri regem, si ejusmodi sint pacta conventa, a quibus discedere lex patiatur, etiamsi pacta honestati sint consentanea: non enim ideo teneri quia juraverit, sed quia justis conventionibus quisque teneatur, quatenus alterius intersit.

2 Nos, ut alibi distinximus, ita hic quoque distinguendum censemus inter actus Regis qui regii sunt, et actus ejusdem privatos. Nam in regiis actibus quæ rex facit eo loco habenda sunt, quasi communitas faceret: in tales autem actus sicut leges ab ipsa communitate factæ vim nullam haberent, quia communitas seipsa superior non est, ita nec leges regiæ. Quare adversus hos contractus restitutio locum non habebit: venit enim illa ex jure civili. Non admittenda igitur exceptio regum adversus contractus quos minores fecissent.

II. 1 Plane si populus regem fecerit non pleno jure, sed additis legibus, poterunt per eas leges contrarii actus irriti

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As to the first head, it is made a question whether the king, as he can relieve his subjects from an oath, can do the same to himself, and put himself back into his original condition. Bodinus thinks that the king may be so reinstated, on the same grounds as a subject would be so; whether he have been circumvented by the fraud and deception of another party, or by his own error, or fear; and this, both in matters which affect the rights of the sovereignty, and those which pertain to private advantage. He adds, that the king is not even bound by an oath, if the conventions made are of that kind from which the law permits parties to recede, even though the agreement is conformable to propriety; for (he holds) he is not therefore bound, because he has sworn, but because every one is bound by just conventions, so far as the interest of another is concerned.

2 We make a distinction here, as we have done in other places, between the acts of the king which are royal acts, and acts of the same person which are private acts. For in royal acts, what the king does is to be held as if it were done by the community: and as laws made by the community itself would have no force over such acts, because the community is not superior to itself, so neither have laws made by the king any such force. Therefore against such contracts, restitution will not hold: for this restitution is a creature of the Civil Law. And thus kings are not relieved from contracts which they had made as minors.

II. 1 If a people have established a king who has not plenary

fieri, aut omnino, aut ex parte, quia eatenus populus jus sibi servavit. De iis autem actibus regum qui pleno jure regnant, sed regnum non ut proprium possident, quibus regnum aut regni pars aut res fiscales alienantur, egimus supra, et ostendimus hos actus ipso naturæ jure nullos esse, ut factos de re aliena.

2 At privati actus regis considerandi sunt, non ut actus communitatis, sed ut actus partis, ac proinde facti eo animo, ut communem legum regulam sequantur. Unde etiam leges, quæ actus quosdam aut simpliciter, aut si is qui læsus est velit, irritos faciunt, locum et hic habebunt, quasi sub ea conditione contractum foret. Sic videmus reges quosdam adversus fœnebre malum sibi consuluisse juris remediis. Poterit tamen rex ut aliorum ita suos actus his legibus solvere; quod an facere voluerit, ex circumstantiis erit æstimandum. Si fecerit, judicanda res erit ex mero jure naturali. Hoc addendum, si quæ lex actum irritum faciat, non in favorem agentis, sed in pœnam, hanc in regum actibus locum non habituram, [2]ut nec

[2] Non quidem pœnam, quatenus coactionem involvit, et a Superiore proficiscitur: sed quatenus pertinet ad damnum datum alteri, cum quo contractum

rights, but is under additional legal constraints, acts contrary to these laws may be by them made void; either altogether, or in part; because to this extent the people had retained a right to itself. In the case of kings who reign with plenary rights, but have not the kingdom as their own property, such acts of theirs as alienate the kingdom or a part thereof, or its revenues, have been discussed above; and we have shewn that such acts are by Natural Law void, as acts done to the property of another.

2 But the private acts of the king are to be considered, not as the acts of the community, but as acts of a private party, and consequently, done with the intention of following the common rule of law. Wherefore the laws which make some acts void, either absolutely, or if the person injured by them demands that they should be so, hold here also; as if the contract had been made under that condition. And accordingly we have seen certain kings protect themselves in this way against the evil of usury*. But the king may release his own acts, as he may those of others, from these laws: and whether he intends to do this, is to be estimated from the circumstances. If he does, the matter must then be judged by mere Natural Law. This is

* Gronovius says that Grotius is here making an excuse for Philip II. of Spain, who repudiated a portion of his debts in 1596: and refers to Mezeray, B. XVIII. Barbeyrac adds, on the same authority, that two years after, Philip revoked this act, and acknowledged his debts.

alias leges pœnales et quicquid vim habet cogendi. Nam punitio et coactio non possunt procedere nisi a voluntatibus diversis: itaque cogens et coactum requirunt distinctas personas, neque sufficiunt distincti respectus.

III. Juramentum autem Rex irritum reddere antecedenter potest ut privatus, si se ipse potestate tale quid jurandi plane privaverit priore juramento: consequenter non potest, quia hic quoque personarum distinctio requiritur. Nam quæ consequenter irrita redduntur, jam antea exceptionem in se habebant, nisi superior noluerit: at ita jurare ut tenearis nisi ipse nolis, perabsurdum est, et naturæ jurisjurandi contrarium. Etsi vero ex jurejurando jus quæri alteri non possit, ob aliquod vitium in persona, tamen eum qui juraverit Deo obstringi supra ostendimus: quod ad reges non minus quam ad alios pertinet, contra quam sentit dicto loco Bodinus.

IV. Promissa quoque plena, et absoluta, atque acceptata, naturaliter jus transferre demonstratum supra est, quod itidem ad reges non minus quam ad alios pertinet, ita ut improbanda Ang. *ad L. Luc.* 2. *D. de* Curt. *Jun. cons.* 138. n. 4.

est, reparandum. Hoc enim respectu Rex potest et debet se ipsum subjicere legi. Ostendimus id plenius in notis nostris Gallicis ad hunc locum. *J. B.*

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to be added; that if any law make an act void, not in favour of the doer, but as a penalty on him, this does not hold against the acts of kings; as in other matters also, penal laws, and all which has a power of coercion do not apply to them. For punishment and coercion can only proceed from diversity of will: the coercer and the coerced require distinct persons; distinct relations [of the same person] are not sufficient.

III. A king, as a private person, may nullify an oath, *antecedently*, if by a prior oath he deprive himself of the power of swearing to such an effect; but *consequently*, [after the act,] he cannot do this [by his royal authority:] for here too a distinction of persons is required. For the oaths which are nullified subsequently to the act, were already understood to be made with the exception, "except a superior refuse his consent;" but to swear in such a sense, that you are bound, except you yourself refuse consent, is absurd, and contrary to the nature of an oath. But although a right may not be acquired by another person in virtue of the oath, on account of some defect in the person who swears, yet that he is bound to God, we have shewn above: and this applies to kings no less than to others; contrary to the sentiments of Bodinus in the place cited.

IV. Also Promises, when full, absolute, and accepted, naturally transfer a right, as we have shewn above; and this likewise applies to

sit hoc quidem sensu eorum sententia, qui negant regem teneri unquam his quæ sine causa promisit: quod tamen quo sensu locum habere possit mox videbimus.

V. Ceterum quod diximus supra, leges civiles regni locum non habere in Regum pactis et contractibus, id recte vidit et Vasquius. Sed quod infert emtionem et venditionem sine certo pretio, locationem et conductionem non expressa mercede, emphyteusin [3]sine scriptura, si a regibus fiant, valitura, non concedendum est: quia hi actus non a rege qua rege, sed ab eo quasi alio quovis fieri solent. In quo actuum genere tantum abest ut communes regni leges vim nullam habeant, ut etiam leges oppidi, ubi Rex habitat, valere credamus; quia speciali ratione rex ibi se habet, ut illius cœtus membrum. Quæ tamen ut diximus ita procedunt, nisi circumstantiæ ostendant placuisse Regi suum actum ab illis legibus immunem facere. Aliud vero exemplum, quod idem adfert Vasquius de promissione quolibet modo facta, bene convenit, et ex his, quæ supra diximus, explicari potest.

Lib. ii. *Contr. Ill.* c. 51. n. 34. Suar. iii. 35. n. 14.

VI. 1 Contractibus quos rex cum subditis iniit obligari

[3] Verius est, Scripturam non requiri, ex natura illius contractus. Vide VINNIUM, in Tit. *Instit. De Locat. Conduct.* § 3. *J. B.*

[4] Confer, circa hanc divisionem, PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. III. cap. IV. § 5. *J. B.*

[a] *Abundantiam bonitatis*] Huc per-

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kings, no less than to others: so that we condemn, in this sense, the opinion of those who say that a king is never bound by the promises which he made without a cause. In what sense this may be truly held, we shall hereafter see.

V. What we have said above, that the Civil Law of the kingdom does not hold in the compacts and contracts of kings, Vasquius also has rightly seen. But his inferences, that buying and selling without a certain price, letting and hiring without stating the hire, a lease without a writing, are valid if done on the part of kings, is not to be conceded: because these acts are not done by the king as king, but by him as by any other person. In this class of acts, it is so far from being true, that the common laws of the kingdom have no force, that we maintain that even the laws of the town in which the king lives are of force: inasmuch as the king abides there in a special manner, as a member of that society. Which, however, is as we say, except circumstances shew that it pleases the king to make his act free from the authority of those laws. Another example which Vasquius gives, of a promise made in any way, agrees well with this rule, and may be explained by what we have said above.

cum naturaliter tantum, non civiliter, Jurisconsulti ferme omnes sentiunt, quod loquendi genus perobscurum est. Nam [4]naturalis obligatio interdum a juris auctoribus dicitur per abusionem de eo quod fieri natura honestum est, quanquam non vere debitum, ut legata integra sine detractione Falcidiæ præstare, solvere debitum quo quis in pœnam creditoris erat liberatus, vicem beneficio rependere, quæ omnia cessare faciunt condictionem indebiti: interdum vero magis proprie id quod vere nos obligat, sive inde jus alteri oriatur, ut in pactis, sive non oriatur, ut in plena et firma pollicitatione. Maimonides *Hebræus* lib. III. Ducis dubitantium capite 54 tria hæc apte distinguit, et quæ non debentur ait venire benignitatis nomine, id est חסד, quam alii interpretes ad Prov. xx. 28 explicant פלגת חטובה [a]*abundantiam bonitatis;* quæ debentur ex jure stricte sumto, משפט *judicium* Hebræis vocari; quæ ex honestate, *justitiam* צדקה, id est æquitatem; ἔλεον, κρίσιν, πίστιν dixit interpres Matthæi xxiii. 23 ubi πίστιν vocat quæ Hellenistis plerumque est δικαιοσύνη. Nam κρίσιν pro eo quod stricte debetur reperias etiam 1 Macc. vii. 18 et viii. 32.

Bal. ad l. I. *D. de pact. L. Princ. leg.* 31. *D. de leg. L. ult. C. de trans. L. Si aquam* 2. *C. de serv. Dd. in c.* 1. *de Const.* Bal. *L. Si pec.* 10. *C. de cond. ob caus. et in l. ex imp.* 3. *C. de test. L.* 1. *C. ad l. Falc. L. Si pœn.* 19. *D. De cond. indeb. L. Sed et si leg.* 25. *§ consul.* 11. *D. De pet. hered.*

tinent ea quæ non ob aliam causam fiunt quam ut liberalitas et munificentia exerceantur, ut loquitur lex I. D. *de Donationibus:* χρηστότης ἐκ πηγῆς πλουσίας ἀποῤῥεῖ τὴν ἡμερότητος· *Ex ubere fonte mansueti ingenii manat beneficentia:* Plutarchus *Catone majore,* (pag. 339 A. Tom. I.)

VI. 1 Almost all jurists deliver an opinion that by contracts which the king enters into with his subjects, he is obliged naturally only, not civilly: which is a very obscure way of speaking. For juristical writers sometimes by an abuse of language call that, *natural obligation,* which it is by nature a handsome thing to do, though it is not truly due: as for an executor to pay legacies entire without the deduction which the Falcidian law allows; to pay a just debt when the creditor has been deprived of his legal right by a penal sentence; to return a benefit for a benefit; none of which can be recovered by an action of false debt. But sometimes, more properly, they use the term for that which truly *obliges* or binds us; whether another person thereby acquire a right, as in pacts, or does not, as in a full and firm *pollicitation* or proffer. Maimonides distinguishes these three cases; things which are not due, he calls *kindnesses;* things due by strict law, *judgments;* things due by propriety, *justice.* So Matth. xxiii. 23, *mercy, judgment, and faith,* are by some interpreted, as if *faith* were put for *righteousness: judgment* means what is strictly due: see 1 Macc. vii. 18, and viii. 32.

2 Civiliter quoque obligari ex actu suo dici quis potest, aut eo sensu, ut obligatio procedat non ex mero jure naturali, sed ex jure civili, vel ex utroque, aut eo sensu, ut in foro actio inde detur. Dicimus ergo ex promisso et contractu Regis, quem cum subditis iniit, nasci veram ac propriam obligationem, quæ jus det ipsis subditis: ea enim est promissorum et contractuum natura, ut supra ostendimus, etiam inter Deum et hominem. Quod si tales sint actus qui a rege, sed ut a quovis alio fiant, etiam civiles leges in eo valebunt: sin actus sit regis qua regis, ad eum civiles leges non pertinent: quod discrimen a Vasquio non satis observatum est; neque tamen eo minus ex utrovis actu nascetur actio, nempe ut declaretur jus creditoris, sed coactio sequi non poterit, ob statum eorum quibuscum negotium est: nam subditis cogere eum, cui sunt subditi, non licet, sed æqualibus in æquales id jus est a natura, superioribus in subditos etiam ex lege.

Jas. *l.* v. *de cond. caus. dat.* Castal. *de Imp.* q. 3. v. 51. Vasq. Lib. i. *contr. ill.* cap. 3. n. 1. Bod. I. c. 8.

VII. Sed hoc quoque sciendum est, posse subditis jus etiam quæsitum auferri per regem duplici modo, aut in pœnam, aut ex vi supereminentis dominii. [5]Sed ut id fiat ex vi super-

Vasq. Lib. i. *contr. ill.* c. 5. *in pr. et* l. 4. c. 1. Castr. Lib. i. *cons.* 229.

[5] Vide PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. cap. 5. § 7. *J. B.*

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2 Again; a person may be said to be civilly obliged by his own act, either in this sense,—that the obligation does not proceed from mere Natural Law, but from the Civil Law, or from both;—or in this sense, that it gives ground for an action in a Court of Law.

We say then that by the promise and contract of a king, which he enters into with his subjects, there arises a true and proper obligation, which confers a right upon the subjects: for this is the nature of promises and contracts, as we have shewn above, even between God and men. But if the acts be such as are done by the king, but done by him, only as by any other man, the Civil Laws also will be valid in that case: but if the act be an act of the king as king, the Civil Laws do not apply to that; which distinction has not been sufficiently attended to by Vasquius. But notwithstanding this distinction, in either case a legal action will arise from the act; namely, to the end that the right of the creditor may be declared: but coaction cannot follow, on account of the condition of those with whom the business is. For it is not allowable for subjects to compel him whose subjects they are: equals have such a right towards equals, by nature; superiors have it over subjects by law only.

VII. This also is to be noted, that a right, even when it has been acquired by subjects, may be taken away by the king in two modes; either as a Penalty, or by the force of Eminent Dominion.

eminentis dominii, primum requiritur utilitas publica; deinde, ut si fieri potest compensatio fiat ei qui suum amisit, ex communi. Hoc ergo sicut in rebus aliis locum habet, ita et in jure quod ex promisso aut contractu quæritur.

VIII. Neque ullo modo hic admittenda est distinctio quam adferunt nonnulli, juris quæsiti ex vi juris naturalis, [6]et ejus quod venit ex lege civili; nam in utrumvis par jus est regis, nec hoc magis quam illud sine causa tolli potest. Ubi enim dominium aut jus aliud alicui legitimo modo partum est, id ne sine causa ei auferatur juris est naturalis. Contra si rex faciat, haud dubie tenetur reparare damnum datum: facit enim contra verum jus subditi. Hoc ergo differt jus subditorum et jus exterorum, quod jus exterorum (hoc est qui nulla ratione subditi sunt) supereminenti dominio nullo modo subest: nam de pœna infra videbimus: subditorum autem jus ei dominio subest, quatenus publica utilitas desiderat.

IX. Ex his quæ diximus et hoc apparet, quam falsum sit quod quidam tradunt, contractus Regum leges esse. Nam ex legibus nemini jus adversus Regem nascitur: ideo si eas

Bal. *in l. Cæs.* 15. *D. de pub.* Bart. *in l. sic.* 7. *D. quod cujus. univ. nom.* Jas. *cons.* 1. col. 4. vol. I. *et alii alleg. a* Vasq. *d.* c. 3. n. 5.

[6] Adde, quæ infra dicentur, Lib. III. cap. 20. § 9. *J. B.*

But to do this by the force of Eminent Dominion, there is required, in the first place, public utility; and next, that, if possible, compensation be made, to him who has lost what was his, at the common expense. And as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract.

VIII. Nor may we, in this matter, in any way admit the distinction which some make, between rights acquired by force of Natural Law, and those which come from the Civil Law. For the right of the king over the one class and the other is equal, and the latter cannot, any more than the former, be taken away without cause. For when ownership, or any other right, has been legitimately acquired by any one, that it may not be taken away from him without cause, is a matter of Natural Law. If the king act in any other way, he is without doubt bound to repair the damage done: for he acts against the true right of the subject. In this therefore the rights of subjects and the rights of foreigners differ. That the rights of foreigners, (that is, of those who are not subjects in any way,) are by no means subject to the right of Eminent Dominion; (whether they are subject to Penalty, we shall hereafter see:) but the rights of subjects are liable to that right, so far as public utility demands.

IX. From what we have said, this also appears:—how false that is which some deliver, that the Contracts of Kings are Laws. For, from

revocet nemini facit injuriam. Peccat tamen si sine justa causa id faciat. At ex promissis et contractibus jus nascitur. Contractibus ligantur contrahentes tantum, legibus subditi omnes. Possunt tamen quædam esse mixta et contractibus et legibus, ut contractus cum vicino rege, aut cum publicano factus, qui simul pro lege publicatur, quatenus ei insunt quæ subditis observanda sunt.

X. [b]Veniamus ad successores: de quibus adhibenda distinctio est, sintne omnium simul bonorum heredes, ut qui regnum, quod in patrimonio est, testamento, vel ab intestato accipiunt; an successores regni duntaxat, puta ex electione nova, aut ex præscripto; sive imitatione quadam vulgaris hereditatis, sive aliter: an vero mixto jure succedentes. Nam qui bonorum omnium ita ut regni heredes sunt, quin promissis et contractibus teneantur dubitandum non est. Pro debitis enim etiam personalibus bona defuncti ut obligata sint, ipsi rerum dominio coævum est.

[b] *Veniamus ad successores*] Vide Scriptores quibus utitur Reinkingius lib. I. classe III. cap. 10.

[c] *At qui in jus regni duntaxat succedunt*] Vide Aymonium editum a Frehero p. 373.

[d] *Directe, hoc est ἀμέσως, hos successores regni, qua tales, non obligari satis manifestum est*] Sic Solomo obligatus non fuit eo promisso, quod Semei David fecerat. [Vide I. Reg. ii. 9. et quod ea de re dictum est apud PUFEN-

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laws, no one acquires a right against the king; therefore, if he revokes them, he does wrong to no one. (He sins, however, if he do so without just cause.) But from his promises and contracts, rights arise. By contracts, the contracting parties only are bound; to laws, all are subject. But yet some transactions may be mixed of contracts and laws, as a treaty made with a neighbouring king, or with a farmer of the revenues, which is at the same time published as a Law, so far as it contains things to be observed by the subjects.

X. Let us proceed to the case of Successors: and with regard to them, we must make a distinction, whether they are heirs to the whole property of the deceased as well as to the kingdom; as those are who receive a patrimonial kingdom by testament, or by intestacy; or whether they are only successors to the kingdom; suppose by a new election, or by the law of the land, or by some imitation of the common rule of inheritance, or otherwise: or whether, finally, they succeed by mixed right. For with regard to those who are heirs of all the property as well as of the kingdom, there can be no doubt that they are bound by the promises and contracts of their predecessor. For the rule, that the property of the deceased is bound for debts, even for

XI. 1 [c]At qui in jus regni duntaxat succedunt; aut partim in bona, in jus regni vero in solidum; quatenus obligentur, tam dignum est quæri, quam confuse hactenus tractatum est. [d]Directe, hoc est ἀμέσως, hos successores regni, qua tales, non obligari satis est manifestum: quia jus non accipiunt ab eo qui proxime decessit, sed a populo, sive ea successio propius accedat ad jus hereditatum vulgarium, sive absit longius: de quo discrimine supra egimus.

2 Sed ἐμμέσως, id est [e]per interpositam civitatem, obligantur etiam tales successores: quod sic intelligetur. Cœtus quilibet, non minus quam personæ singulares, jus habet se obligandi per se, aut per majorem sui partem. Hoc jus transferre potest tum expresse, tum per consequentiam necessariam, puta imperium transferendo; nam in moralibus qui dat finem, dat ea quæ ad finem perducunt.

XII. 1 Non tamen in infinitum hoc abit: neque enim obligandi infinita potestas ad imperium recte exercendum neces-

DORFIUM, *De Jure Nat. et Gent.* Lib. IV. cap. 11. § 13. *J. B.*]

[e] *Per interpositam civitatem obligantur*] Similia vide c. 1. *de solutionibus.* Propius ad rem facit c. Abbate, 3. *de sententiis et re judicata,* ubi notanda verba: *Cum tam supradicti avi donatio quam locorum acquisitio promissorum fuerint nomine regni factæ.* Vide et Treutl. parte I. disput. VI. thesi 7. Syr. de pace religionis concl. 19.

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personal debts, is a rule coeval with property itself.

XI. 1 But of those who succeed only to the kingdom; or to the property as sharers only, but to the kingdom, alone; how far they are bound, is a matter worthy of inquiry, especially as it has hitherto been treated very confusedly. That the successors of the kingdom, as such, are not directly and *immediately* bound [by those contracts,] is evident enough; because they receive their rights, not from him who has lately deceased, but from the people; whether the rule of succession approach more nearly to the rule of common inheritance, or recede further from it; of which difference we have treated above.

2 But *mediately*, that is, by the mediate effect of the State, such successors also are bound; which will be thus understood. Every society, no less than individual persons, has the right of binding itself, by its own act, or that of the majority. And this right it may transfer, either expressly, or by necessary consequence; suppose, by transferring the government: for in moral matters, he who gives the end, gives the means which lead to the end.

XII. 1 But this does not go to an infinite extent. For an infinite power of imposing such obligations is not necessary, in order rightly

L. Quifund. 7. § si tut. 3. D. pro emp. L. ab agnat. 12. D. de curat. L. 22. pact. C. de pact. L. contr. 28. § si curat. 1. D. de pact. L. item. 14. D. de pact. Alph. de Cast. l. 1. de leg. pœn. c. 5. Vict. in Rel. de pot. Papæ. et conc. num. 18.

L. Præs. 12. C. De trans.

saria est, ut nec ad tutelam aut curationem, sed quatenus ejus potestatis natura exigit. [f] *Tutor domini loco habetur*, inquit Julianus, *cum rem administrat, non cum pupillum spoliat;* quo sensu et illud intelligendum quod dixit Ulpianus, magistri societatis pactum societati non prodesse tantum, sed et obesse. Neque tamen, ut quidam existimant, lex hæc ad naturam negotiorum gestorum exigenda est, ut tum demum ratus sit habendus actus, si utiliter gestus sit. Nam ad tales angustias reipublicæ imperantem redigere, ipsi reipublicæ esset periculosum. Quare nec sensisse hoc credendus est populus cum imperium detulit. Sed quod a Romanis Imperatoribus in causa civitatis responsum est, valere transactionem quam magistratus fecissent in re dubia, non si indubitate id quod deberi possit remissum sit, idem ad nostram de populo toto quæstionem referri debet ac potest, sed servata proportione.

[f] *Tutor domini loco habetur, inquit Julianus, cum rem administrat, non cum pupillum spoliat*] Huc pertinent ea quæ habet Camdenus parte IV. Elisabethæ anno cIↃ IↃ XCV; et quæ Cromerus habet de Georgii Bohemiæ regis ære alieno imprudenter suscepto a Wladislao, lib. XXVII. (pag. 593.)

[g] *Esse quædam evidenter stultæ atque absurdæ*] Ut lex Cabadis Persarum regis apud Procopium (*Persic.* Lib. I. c. 5) et Agathiam. (Lib. IV. c. 12.) Hoc legis argumentum ad alienationes aptat Petrus, Legatus Justini II. ad Chosroen, agens de iis quæ Justinianus Saracenis promisisse videbatur: *οὐ γὰρ ἑνὸς ἀνδρὸς ἔθει, φημὶ δὲ τὸ πλέον καὶ νόμῳ μὴ λυσιτελοῦντι, καὶ εἰ πέφυκε βασιλεὺς ὁ τὸ ἔθος ἰσχυροποιήσας ἤγουν νομοθετήσας, πολιτεία καταδικασθήσεταί ποτε· Non enim ex unius hominis consuetudine, aut etiam lege non utili,*

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to exercise the government: as such power also is not necessary for a guardian or a *Tutor;* but only so much as the nature of the office requires. The *Tutor is reckoned in the place of the owner*, says Julian, *when he administers his pupil's affairs, not when he plunders him:* and in this sense we are to understand what Ulpian says, that the contract of the master of a society, may not only bring advantage to the society, but also disadvantage. But yet we are not, as some hold, to reduce the engagements of a king to the rules of one man undertaking another's busines; namely, that his acts are then only valid when they turn out to the advantage of the principal party. For to put the Ruler of the State to such a strait, would be dangerous to the State itself. And accordingly, the community is to be supposed to have held this opinion, when it bestowed the government upon him. And what the Roman Emperors declared, in a Rescript with respect to the corporation of a town,—that what was transacted by the magistrates should be of force in a doubtful case, but not, if what was unquestionably due was given away,—may be and ought to be applied to our question, relative to the whole People, observing a due pro-

2 Sicut ergo leges non quævis subditos obligant, possunt enim, etiam extra eas quæ jubent quod illicitum est, [g] esse quædam evidenter stultæ atque absurdæ; sic et contractus regentium ita obligant subditos, si probabilem habeant rationem, [h] quod in dubio ob regentium auctoritatem præsumi debet. Quæ distinctio multo est melior, quam illa quæ a multis afferri solet de exitu modicæ aut immodicæ læsionis. Non enim exitus in hac re, sed probabilis ratio rei gerendæ spectanda est: quæ si adsit, et populus ipse obligabitur, si quo casu sui juris esse inceperit, et successores ut populi capita. Nam et si quid populus liber contraxisset, obligaretur is qui postea regnum plenissimo jure acciperet.

Thom. 1. 2. q. 95. art. 3. Pan. *in c. quæ in eccl.* n. 14. Felin. n. 60. Turrec. *in c. sent.* 2. q. 3 *concl.* 6 et 7. n. 8. et 9. *Alii in c. lic. devot. Aguir Apol.* p. 1. n 70.

3 [i] Laudatur Cæsar Titus hoc nomine, quod beneficia a superioribus concessa a se peti passus non est, cum Tiberius, et eum secuti, non aliter rata habuissent superiorum beneficia,

etiam si Imperator sit qui morem talem firmaverit, aut lege sanxerit, respublica unquam condemnabitur. [Hoc est e MENANDRI *Protectoris Legat.* c. 12. sed ibi Joannes Legatus loquitur, non Petrus. *J. B.*]

[h] *Quod in dubio ob regentium auctoritatem præsumi debet*] Sidonius Lib. V. epistola XVII. *Quicquid spoponderit princeps, semper redhibet principatus.* Vide Ambrosium in laudibus Theodosii, (pag. 492 c. *Ed. Paris.* 1569.) Symmachum Lib. IV. epist. 7, et 19. Lib. V. 37. Conc. Toletanum V. c. 6. C. *ceterum* 3. *de Donationibus:* debita Justiniani, qui æs magnum reliquerat, a Justino imperii successore persoluta narrat Corippus Lib. II.

[i] *Laudatur Cæsar Titus hoc nomine*] Historia apud Suetonium c. 8. apud Xiphilinum ex Dione, (pag. 212. *Edit. Rob. Steph.*) et apud Victorem, (*in Cæ-*

portion in the application.

2 As the subjects are not bound by every law; for there may be laws, (even without going to those which command something unlawful,) which are evidently foolish and absurd;—so too the contracts of Governors then bind their subjects, when they have a probable reason; and in a doubtful case, this may be presumed, on the authority of the Governors. And this distinction is much better than that which is put forth by many, governed by the result, according as it is a moderate or an immoderate damage. For it is not the result which is to be regarded in such a case, but the probable reason for doing the thing; if there be such a reason, the People itself will be bound, if by any event it should become its own master; and the successors to the government, as the heads of the People. For, in like manner, if a free People had made any engagement, he who afterwards should receive the sovereignty, in the fullest manner, would be bound by the engagement.

3 The emperor Titus is praised on this account, that he would not allow himself to be petitioned to confirm any thing which his

nisi eadem iisdem et ipsi dedissent. Titi exemplum secutus Imperator optimus Nerva in Edicto quod [k]apud Plinium exstat sic ait: *Nolo existimet quisquam quæ alio Principe vel privatim vel publice est consecutus, ideo saltem a me rescindi, ut potius mihi debeat si illa rata et certa fecero, nec gratulatio ullius instauratis eget precibus.* At vero de

Hist. iii. 55. Vitellio cum narrasset Tacitus eum, nulla posterum cura, lacerasse imperium, vulgo ad magnitudinem beneficiorum accurrente, quibusdam et pecunia emercantibus, addit: *Apud sapientes cassa habebantur, [l]quæ neque dari neque accipi, salva republica, poterant.*

4 Illud hic addendum est, si quo casu contractus incipiat vergere non ad damnum modo aliquod, sed ad perniciem publicam, ita ut ab initio contractus in extensione ad illum casum

sarib. c. 10.) Simile c. Justitiæ, 15. causa XXV. quæst. i. Gail. obs. 11. lx. 15. Vide et Radevici historiam. Gunterus *Ligurino* Lib. V:

Neve secuturi factum subvertere reges
Aut revocare queant, regali tuta sigillo
Argumenta Duci, monimentaque certa reliquit.
(vers. 569, *et seqq.*)

Et libro VIII. (vers. 579, &c.):

Tanta tamen clari fuit indulgentia regis,
Ut quicunque bona priscorum munera regum
Hactenus ista fide possederat, idque probare
Legitimis poterat vel demonstrare tabellis,
Principis assensu titulo gavisus eodem
Nunc quoque possideat.

[k] *Apud Plinium*] x. Epist. 66.

[l] *Quæ neque dari neque accipi, salva republica, poterant*] Laudat et applicat Mariana ad immensam munificentiam Friderici Regis Neapolitani XXVI. 16. A Nerone donata etiam ab emtoribus repetiit Galba, relicta decima. Tacitus *Historiarum* I. (cap. 20) et Plutarchus (*in Galb.* Tom. II. pag. 1060 A.) Pertinax etiam a libertis ea exegit quæ sub specie venditionis, Commodo Principe, lucrifecerant. [*Capitolinus*, cap. 8.] Basilius Macedo Imperator repetiit quæ Michaël Imperator elargitus fuerat. Zonaras de eo (Lib. XVI. cap. 8. *Ed. Reg.*): Ἐψήφιστο παρὰ πάντων τοὺς

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predecessors had granted, [holding them valid without such process;] while Tiberius and those emperors who followed him, did not recognize the grants of their predecessors as valid, till they had themselves repeated them. The excellent emperor Nerva, following the example of Titus, says, in an edict which is extant in Pliny, *Let no man suppose that what he has obtained from another Prince, either privately or publicly, shall be by me revoked, that so, if I confirm those grants, he may be the more obliged to me; no man's congratulation need be accompanied by such petitions.* But on the other hand, when Tacitus had related of Vitellius, that he had torn the empire in pieces, reckless of the interests of posterity, the common world flocking about him to catch his extravagant gifts, and some even purchasing his favour with money; he adds: *Wise men held those grants to be void, which could be neither given nor received without damage to the State.*

4 That must also here be added; that if in any case a contract

censendus fuisset injustus et illicitus, tunc non tam revocari eum contractum posse, [m]quam declarari eum non ultra obligare, quasi factum sub conditione, sine qua juste fieri non potuit.

5 Quæ de contractibus diximus, eadem intelligenda sunt [n]de alienatione pecuniæ populi, aut rei alterius quam secundum leges rex alienare bono publico possit. Nam hic quoque similis adhibenda est distinctio, an probabilis donandi, aut aliter alienandi fuerit ratio.

6 At si contractus ad regni ejusve partis aut patrimonii regalis, quatenus id Regi permissum non est, alienationem pertineant, non valebunt, ut facti de re aliena. Tantundem erit in regnis restrictis, si quam materiam, aut actuum genus populus a potestate regia exceperit. Nam ut tales actus vale-

ἐξ οὐδεμίας χρήματα λαβόντας εὐλόγου λαβῆς, ἀναδιδόναι ταῦτα, ἢ τόγε δὴ μετριώτερον ἡμίσυ· *Communi consensu placuit, ut qui pecunias nulla probabili ex causa accepissent, partim totas, partim dimidium redderent.* Vide eundem Isaacio Comneno. (Lib. XVIII. cap. 4.) De donationibus Ludovici XI. vide Serranum Carolo VIII. (pag. 413.) De ejusdem donationibus, etiam quæ Ecclesiis factæ, non servatis, Philippum Cominæum, Lib. IX. (*Vers. Sleidan.* Lib. VI. cap. 7. ipsius Auctor.) Marianam vero de donationibus quas Arragoniæ rex Ramirus fecerat, rescissis, libro X. c. 16. de Isabellæ donationibus rescissis per ipsam XXVIII. 11. Cromerum de Casimiri regis Poloniæ testamento partim probato, partim improbato, XII. (Lib. XIII. pag. 322, 323.)

[m] *Quam declarari eum non ultra obligare*] C. Suggestum est, 9. de decimis. Exemplum in Actis Alfonsi et Sanctii apud Marianam, Lib. XII. c. ultimo: apud Camdenum dicto anno cIↃ IↃ XCV. et anno cIↃ IↃ XCVII. in controversia Hanseatica.

[n] *De alienatione*] Habes huc pertinentia in Conciliis Galliæ tomo III.

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begins to tend, not only to some loss, but to the ruin of the community, so that from the beginning the contract in its extension to that case would have been unjust and unlawful; then that contract may, not so much be revoked, as declared not to be binding any longer, as being made without the condition without which it could not justly be made.

5 What we have said of contracts, holds also of the alienation of the People's money, and of any other things which the king has by law a power to alienate for the public good. For here too a similar distinction is to be applied, whether there was a probable reason for giving or otherwise alienating.

6 But if the engagements have reference to the alienation of the kingdom or its parts, or of the royal patrimony, they will be invalid, as being a contract about that which is another's. The same will hold in limited monarchies, if there be any matter or kind of act

ant, populi per se, aut per eos, qui populum legitime referunt, consensus requiritur, ut ex iis quæ de alienatione supra diximus intelligi potest. Quibus distinctionibus adhibitis facile judicari poterit, justæ an injustæ fuerint exceptiones regum, qui priorum regum nomina exsolvere recusarunt, quorum heredes non fuerant: quarum exempla apud Bodinum videre est.

Lib. i. c. 8. § *Neque enim.* Curt. *Jun. cons.* 138. n. 4. *cons.* 157. n. 18. Crav. *de ant. tem.* 2. p. 1. *part. prin.* n. 38. Bell. *in spec. prin. rubr.* 26. Ant. Gabr. Lib. i. *tit. de jur. quæs. non tollend. conc.* 6. n. 20. et *concl.* 7.

XIII. Illud quoque [o] a multis traditum, beneficia Principum, quæ liberaliter sunt concessa, semper posse revocari, sine distinctione transmittendum non est. Sunt enim quædam beneficia quæ rex de suo facit, et quæ, nisi adsit precarii clausula, vim habent perfectæ donationis. [p] Hæc revocari non possunt, nisi quod subditos attinet in pœnam, aut ob utilitatem publicam cum compensatione si fieri potest. Sunt alia quæ vinculum duntaxat legis demunt sine ullo contractu. Et hæc sunt revocabilia. Quia sicut lex sublata universaliter reponi universaliter semper potest, ita et particulariter sublata particulariter reponi. Nullum enim hic jus quæsitum est adversus legis auctorem.

[o] *A multis traditum*] Vide citatos per Reinkingium, libro II. classe ii. cap. 8. num. 26. et sequentibus.

[p] *Hæc revocari non possunt*] Vide Afflictum decis. CXXVIII. num. 10.

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which the people has excepted from the royal power. For in order to give validity to such acts, there is required the consent of the People, either by itself, or by those who legitimately represent the People; as may be understood by what we have said above respecting alienation. By the application of these distinctions, it will be easy to judge whether the pleas of kings who refuse to pay their predecessors' debts, not being their heirs, are just or unjust: of which examples may be seen in Bodinus.

XIII. Nor is that which many have delivered, that the favours of Princes, granted out of pure liberality, may at any time be revoked, to be allowed to pass on without distinction. For there are some grants which the king makes out of his own property, and which, except they are granted expressly during pleasure only, have the force of a complete donation. And these cannot be revoked, except, in the case of subjects, in the way of penalty, or for the sake of public utility, and then with compensation if it may be. There are other grants which merely remove legal restrictions without any contract. These are revocable. Because, as the law which is relaxed universally may always be re-established universally, so, that which is relaxed particularly may be re-established particularly. For in this case no right against the author of the law is acquired.

XIV. Contractibus vero eorum, qui sine jure imperium invaserunt, non tenebuntur populi aut veri reges; nam hi jus obligandi populum non habuerunt. De in rem verso tamen tenebuntur, id est quatenus locupletiores facti sunt.

XIV. By contracts made by those who without right have usurped the government, the People, or the Legitimate Sovereign are not bound. For Usurpers have no authority to bind the People. However, the People are bound by what has been expended for their benefit [by an usurper;] that is, so far as they are the richer for it.

CAPUT XV.

DE FEDERIBUS AC SPONSIONIBUS.

I. *Publicæ conventiones quæ.*
II. *Dividuntur in federa, sponsiones, pactiones alias.*
III. *Federum et sponsionum discrimen, et in quid sponsiones obligent.*
IV. *Rejecta divisio federum quam Menippus fecit.*
V. *Federum divisio in ea quæ idem statuunt cum jure naturæ: et unde id natum.*
VI. *Et ea quæ aliquid adjiciunt: quæ sunt æqualia;*
VII. *Aut inæqualia, quæ rursum dividuntur.*
VIII. *Federa cum his qui alieni sunt a vera religione licita esse jure naturæ:*
IX. *Nec universaliter prohiberi lege Hebræa;*
X. *Nec Christiana.*
XI. *Cautiones circa talia federa.*
XII. *Christianos omnes obligatos ad fedus ineundum adversus hostes Christianismi.*
XIII. *Si plures federatorum bellum gerant, cui potius opem ferri oporteat, distinctionibus explicatur.*
XIV. *An tacite renovatum censeatur fedus.*
XV. *An partis alterius perfidia alteram liberet.*
XVI. *In quid teneantur sponsores si sponsio improbetur, ubi de Caudina sponsione.*
XVII. *An sponsio non improbata obliget ex notitia et silentio, distinctionibus explicatur, ubi de sponsione Lucta-tiana.*

L. Conven. 5. D. de Pact. I. CONVENTIONES Ulpianus divisit in publicas et privatas: et publicam exposuit non ut quidam putant definitione, sed exemplis additis, *quæ fit per pacem,* [1] quod primum

[1] Vide Clariss. Noodtii Librum *de Pactis et Transactionibus*, cap. 7. *J. B.*

[a] *Quod apud Senecam patrem est*] Contr. iv. 25.

[b] *In regnis, regum est fedus facere*] Vide quæ infra Lib. iii. c. xx. § 2. et

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Chapter XV. *Of Treaties and Sponsions**.

I. Compacts or Conventions are divided by Ulpian into public and private: and public, he expounds, not by definition, but by examples which he gives; *a treaty of peace,* which is the first example; or *when the generals in a war make some convention,* which is the second. By public compacts or conventions, therefore, he understands those which can only be made by the supreme government or some public governor; by which character they differ, not only from the contracts of private persons, but from the contracts of kings about their private concerns. For though causes of war arise from the latter also, they

* Mr Wheaton adopts the term *Sponsions,* exactly in the sense in which Grotius uses it in this Chapter, as denoting engagements made without full authority. *International Law,* Part iii. Chap. 11, § 3. (1836).

exemplum est: *quoties inter se duces belli quædam paciscuntur;* quod secundum. Publicas ergo conventiones eas intelligit, quæ nisi jure imperii majoris aut minoris fieri nequeunt, qua nota differunt non tantum a contractibus privatorum, sed et a contractibus regum circa negotia privata. Quanquam ex privatis quoque istis belli causa nasci solet, frequentius tamen ex publicis. Ideo postquam de conventionibus generaliter a nobis tractata sunt satis multa, quædam addenda sunt quæ ad excellentiorem hanc speciem pertineant.

II. Publicas has conventiones, quas Græci συνθήκας vocant, dividere possumus in federa, sponsiones, pactiones alias.

III. 1 De federum et sponsionum discrimine adiri potest Livius libro IX. ubi recte nos docet federa esse quæ fiunt jussu Cap. 5. summæ potestatis, et in quibus ipse populus iræ divinæ obstringitur si minus stetur dictis. Ea apud Romanos peragi per feciales solebant addito patre patrato. Sponsio autem est, ubi hi qui a potestate summa mandatum ejus rei non habent aliquid promittunt, quod illam proprie tangit. Apud Sallustium legimus: *Senatus uti par erat decrevit, suo atque* Bell. Jugurth. c. 43. *populi injussu nullum potuisse fedus fieri.* Hieronymus Syracusarum rex cum Annibale, ut narrat Livius, societatem Lib. xxiv. 6. fecerat: at postea Carthaginem misit ad fedus ex societate faciendum. Quare [a] quod apud Senecam patrem est: *Imperator fedus percussit, videtur populus percussisse Romanus, et federe continetur:* ad antiquos eos pertinet, qui speciale ejus rei mandatum acceperant. At [b] in regnis, regum est fedus facere. Euripides *Supplicibus* (vers. 1188, et seqq.):

sequentibus. Servius ad illud II. *Æneidos* (vers. 161):

Servataque serves
Troja fidem;

Quia quod rex promittit videtur respublica promittere. Et ubi Æneas singulari certamine pugnaturus prius cum Latino fedus facit; Turnum, ait, *non in-*

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proceed more commonly from public questions. Therefore, since we have discussed many points with regard to compacts in general, we must add some remarks belonging to this more eminent kind of compact.

II. These public agreements we may divide into Public Treaties, Sponsions, and other Compacts*.

III. 1 With regard to the difference of Public Treaties (*Fœdera*) and Conventions made on personal responsibility (*Sponsiones*), we may take Livy's view, in which he says that *fœdera* are treaties made by

* See *E. M.* 1124.

Τόνδε δ' ὀμνύναι χρεὼν
Ἄδραστον· οὗτος κύριος τύραννος ὢν
Πάσης ὑπὲρ γῆς Δαναΐδων ὁρκωτομεῖν.

Adrastum hunc opus
Jurare: namque is jus habet regni potens
Ut civitatem federe obstringat suo.

Legendum enim ibi, ut diximus, *ὁρκωτομεῖν*, [2] non *ὁρκωτομεῖ*.

2 Sicut autem magistratus populum non obligant, ita nec Lib. v. 49. minor pars populi: quod pro Romanis est adversus Gallos Senonas: [3] nam major pars populi erat apud Dictatorem Camillum; bifariam autem, ut apud Gellium est, cum populo agi non potest.

3 Sed ubi qui jus populi non habent, de eo quod populi est spoponderunt, videamus in quid teneantur. Putet forte aliquis hoc casu sponsores fidem liberasse, si operam omnem dedissent, ut id quod spoponderunt fieret, secundum ea quæ de promisso tertii facto [c] supra diximus: sed negotii hujus, cui

ducit jurantem, quia præsente rege non habet potestatem. (In *Æn.* XII. 212.)

[2] Ita quidem legitur in omnibus Edd. istius Operis: sed pro voce illa, Linguæ Græcæ ignota, voluit scribere Auctor *ὁρκωμοτεῖν* et *ὁρκωμοτεῖ*, ut habent omnes Editiones Euripidis. Ceterum emendatio illa fugit diligentissimum Barnesium, qui alias de ea aliquid dicere non omisisset. *J. B.*

[3] Non tenebantur Galli scire, Camillum Dictatorem creatum fuisse, neque

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the sovereign power of the State, in which the people is liable to the Divine wrath if it do not make good its engagements. Among the Romans they were formally made by the *Feciales*, with the *Pater Patratus* at their head. *Sponsions* is the term which we may use when persons not having a commission from the Supreme Authority make any engagement which properly touches that authority. Sallust says, *The Senate, as was to be expected, decreed that no Treaty* (*fœdus*) *could be made without its direction and that of the people.* Hieronymus, king of Syracuse, made a Convention of alliance with Annibal; but afterwards sent to Carthage to convert the Convention into a Treaty. So that when Seneca says, *The Treaty made by the General was held made by the People*, he must mean the generals of the old time, who had such a commission. In kingdoms, it is the king's office to make Treaties. See Euripides.

2 As a Magistrate's acts do not bind the People, so neither do those of the smaller part of the people: which justifies the Romans in breaking their convention with the Galli Senones; for the greater part of the people was with the Dictator Camillus; and as Gellius says, the People cannot be treated with in two bodies.

3 But when they who have not authority from the people have

contractus inest, natura obligationem multo strictiorem desiderat. Nam qui contrahendo aliquid de suo dat, aut promittit, is vicissim præstari reipsa sibi aliquid vult; unde et jure civili, quod facti alieni promissiones repudiat, promissio tamen ratam rem haberi ad id quod interest obstringit.

IV. Federa Menippus regis Antiochi ad Romanos Legatus, referente [d]Livio, magis ex usu suo quam ex præscripto artis ita divisit, ut diceret tria esse eorum federum, quæ inter se pacisecrentur reges civitatesque, genera: unum cum bello victis dicerentur leges, quo in genere quid victum habere, quo mulctari cum vellet, victoris esse arbitrium: alterum, cum pares bello æquo federe in pacem atque amicitiam venirent: tunc repeti reddique per conventionem res, et si quarum turbata bello possessio sit, eas aut ex formula juris antiqui, aut ex partis utriusque commodo componi: tertium esse genus, cum qui hostes nunquam fuerint ad amicitiam sociali federe inter se jungendam coëant: quos nec dicere leges, nec accipere. Lib. xxxiv. 57.

inquirere, major an minor pars Populi Capitolio includeretur: tum ibi Senatum, civium partem augustiorem, videbant. Plura diximus in Notis nostris Gallicis. *J. B.*

[c] *Supra diximus*] Hoc lib. c. xi. § 22.

[d] *Livio*] Adde Diodorum Siculum Exc. leg. IV. (collect. a Fulvio Ursino, pag. 315.)

made a convention respecting something which belongs to the rights of the people, let us see to what they are bound. It may be thought perhaps that, in this case, the party who made the convention have performed their engagement, if they have done all that was possible for them, that the terms of the convention on their part should be fulfilled; according to what we have said in speaking of promises. But the nature of these affairs, which involve a contract and not a mere promise, requires a much stricter obligation. For he who in a contract gives anything of his own, or promises it, expects something to be done for him by the other side: whence by the Civil Law also, which repudiates promises for the acts of others, yet a promise of the agent binds and is valid so far as he is concerned.

IV. In Livy, Menippus, rather for his purpose than scientifically, divides Treaties between Kings and States into three kinds; treaties of a conqueror in war with the conquered, and in these the terms depend on the will of the victor: treaties of peace between parties who end a war with equal success; and here the terms are equal, and possessions which had been disturbed by war are restored by agreement; and these treaties are constructed either on the ancient forms, or according to the convenience of the parties: and the third kind, when those who have never been enemies make a treaty of

V. 1 At nobis accuratius instituenda partitio est, ut primum dicamus fedora alia idem constituere, quod juris est naturalis, alia aliquid ei adjicere. [4] Prioris generis fedora non tantum fieri solent inter hostes qui a bello discedunt, sed olim et fiebant sæpe, et aliquo modo erant necessaria inter eos qui ante nihil contraxissent: id inde ortum, quod regula illa juris naturalis, cognationem inter homines quandam esse a natura, ac proinde nefas esse alterum ab altero lædi, ut olim ante diluvium, ita rursus aliquo post diluvium tempore malis moribus esset obliterata, [e] ita ut latrocinari et prædas agere in externos, nullo bello indicto, pro licito haberetur; quod Σκυθισμὸν vocat Epiphanius.

Præf. adv. Hær. et Lib. i. p. 4. *et seqq.*

2 Hinc illa [f] apud Homerum, an prædones estis? amica interrogatio, [g] cujus et Thucydides meminit, et in Solonis lege veteri collegia ἐπὶ λείαν ἐρχομένων· quippe, ut Justinus ait, ad Tarquinii tempora latrocinium maris gloria habebatur: et illud in Romano jure, ut si cum gente aliqua neque amici-

L. ult. D. de colleg.

Lib. xliii. 3.

[4] Confer Pufendorfium, *De Jure Nat. et Gent.* Lib. viii. cap. 10. *J. B.*

[e] *Ita ut latrocinari et prædas agere in externos, nullo bello indicto, pro licito haberetur*] Cæsar de Germanis, (*Bell. Gall.* vi. 23.) *Latrocinia nullam habent infamiam quæ extra fines cujusve civitatis fiunt.* Accedit Testis Tacitus *de Moribus Germaniæ*, (cap. 14 et 26) et Saxo libro xiv. et alibi. Idem de Tyrrhenis scriptum est Servio ad viii. 429. et x. *Æneidos*, et de aliis gentibus ad primum *Æneidos.* Diodoro Siculo (Lib. v. cap. 34) *de Lusitanis:* quicum Plutarchus consentit Mario: *τὸ λῃστεύειν οὔπω τότε τῶν Ἰβήρων οὐχὶ κάλλιστον ἡγουμένων· ad id tempus Hispanis latrocinari inter pulcherrima habebatur.*

friendship and alliance; neither party giving and neither receiving the law.

V. 1 We must make a more accurate division. We say then that some treaties establish that which is conformable to Natural Law; others add something to it. Treaties of the former kind are not only commonly made by hostile parties ending a war, but formerly were both frequent, and in a certain way necessary, between those who had before had nothing to do with each other. Which arose from this, that the rule of Natural Law, that there is a certain natural relationship among men, and that therefore it is unlawful for one man to harm another, as it was obliterated by vicious habits before the deluge, so was it again after the deluge: so that robbery and plunder of strangers without declaring war, was held lawful: a *Scythism*, as Epiphanius calls it.

2 Hence we have that question in Homer, Are ye Pirates? asked as an inoffensive inquiry, as Thucydides notices: and in an old law of Solon there are mentioned companies of Freebooters; since, as

tiam, neque hospitium, neque fedus amicitiæ causa factum habeatur, hi hostes quidem non sint: quod autem ex Romano ad eos pervenerat, illorum fiat, et liber homo Romanus ab eis captus servus fiat: idemque sit, si quis inde ad Romanos perveniat: et hoc quoque casu postliminium detur. Sic Corcyrenses olim ante belli Peloponnesiaci tempora hostes Atheniensium non erant, sed nec pacem cum illis nec inducias habebant, ut ex oratione Corinthiorum apud Thucydidem Lib. i. 40.
apparet. De Boccho Sallustius: *nobis neque bello neque* Bell. Jug. c. 22.
pace cognitus. Hinc in barbaros prædam exercere laudatum Aristoteli, et ipsa vox hostis veteri Latio nihil nisi externum Politic. i. 8.
significabat.

3 Sub hoc genere comprehendo et federa quibus cavetur, ut utrinque jus hospitii, ut jus commercii sit, quatenus ista sub jure naturali veniunt, qua de re egimus alibi. Utitur hoc discrimine Arco, in oratione ad Achæos apud Livium, ubi Liv. xli. 24, 29.
non de societate ait quæri, sed de commercio præbendi repe-

(Pag. 408.) Simile est quod Judæi damnum datum ei qui nec Judæus fit, nec Judæis federatus, sarciendum negant. [Vide Baba Kama, cap. i. § 2. pag. 13. *Ed. Constantini l'Empereur. J. B.*]

[f] *Apud Homerum*] *Odyssea* γ. ubi Scholiastes: οὐκ ἄδοξον ἦν παρὰ τοῖς παλαιοῖς τὸ λῃστεύειν, ἀλλ' εὔδοξον. *Latrocinari apud antiquos non tantum infamia carebat, sed insuper gloriosum ducebatur.* (Ad vers. 71.)

[g] *Cujus et Thucydides meminit*] Libro I. additque: οὐκ ἔχοντός πω αἰσχύνην τούτου τοῦ ἔργου, φέροντος δέ τι καὶ δόξης μᾶλλον· *nondum infamiam habebat id vitæ genus, quin potius laudi tribuebatur.* (Cap. 5.)

Justin says, up to the time of Tarquin, Sea Rovers were objects of admiration: and again, in the old Roman law, if there be any nation with which the Romans have neither friendship, nor friendly intercourse, nor alliance, they are not enemies indeed; but that what belonging to the Romans goes into their power is theirs, and a free Roman taken by them becomes a captive; and the same if any come from them to the Romans. Thus the Corcyreans, before the Peloponnesian war, were not enemies of the Athenians, but had neither peace nor truce with them, as appears by the oration of the Corinthians in Thucydides. Sallust says of Bocchus, *not known to us either in war or in peace.* Hence Aristotle praises those who plunder barbarians: and the old Latin word *hostis* meant only stranger.

3 In this class are comprehended treaties in which it is provided that there shall be on both sides the right of hospitality and of intercourse, so far as they come under Natural Law, of which we have treated elsewhere. This distinction is referred to by Arcus in Livy, where he says, that the question is not concerning alliance but inter-

tendique juris: nempe ne servis Macedonum apud se perfugium esset. Hoc genus totum conventionum Græci stricte εἰρήνην vocant, et opponunt σπονδαῖς, ut tum alibi videre est, tum in oratione Andocidis de pace cum Lacedæmoniis. *Orat.* iii. p. 271.

VI. 1 Conventiones quæ juri naturæ aliquid adjiciunt, aut æquales sunt, aut inæquales. [h] Æquales sunt quæ utrimque eodem modo se habent αἳ ἴσως καὶ κοινῶς ἐν ἀμφοτέροις ἔχουσι, ut Isocrates in Panegyrico loquitur: quo illud Virgilii pertinet (*Æn.* xii. 190, 191): p. 78 a.

> Nec mihi regna peto, paribus sed legibus ambas
> Invictas gentes æterna in federa mittam.

Græci istas vocant modo συνθήκας simpliciter, modo συνθήκας ἐπὶ ἴσῃ καὶ ὁμοίᾳ, ut apud Appianum et Xenophontem videre est, has magis proprie σπονδάς, et quatenus minus dignos respiciunt προστάγματα, aut συνθήκας ἐκ τῶν ἐπιταγμάτων, quas [5] Demosthenes in oratione de Rhodiorum libertate fugiendas ait his qui libertatem amant, quia ad servitutem accedant proxime.

2 Utriusque modi federa aut pacis aut societatis alicujus fiunt causa. Æqualia pacis, ut quæ de restituendis captivis,

[h] *Æquales sunt*] Sic Plinius Parthos ait cum Scythis ex æquo degere. (*Hist. Nat.* vi. 25.) Pompeius apud Lucanum de eadem Parthorum gente (viii. 232):

> Solus
> Ex æquo me Parthus adit.

[5] Immo locus ille est Isocratis, in Archidam. En ipsa verba: Καί τοι χρὴ τοὺς βουλομένους, ἐλευθέρους εἶναι, τὰς μὲν, ἐκ τῶν ἐπιταγμάτων συνθήκας φεύγειν, ὡς ἐγγὺς δουλείας οὔσας. Pag. 126 c. *Ed. H. Steph.* Confudit Auctor, ideo quod in laudata Oratione Demosthenis aliquid legerat de Rhodiis,

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change of rights; namely, that they should not let the Macedonian slaves find a refuge among them. The whole of this class of conventions the Gauls call *Peace*, and oppose to *Truce*. See Andocides.

VI. 1 Conventions which add something to Natural Law are either equal or unequal. Those are equal, which bear equally and commonly on both parties, as Isocrates says. So Virgil. The Greeks distinguish them from Unequal Compacts and Conventions of Command, which are less dignified, and, as Demosthenes says, to be avoided by those who love liberty, as approaching to servitude.

2 Conventions of both kinds are made for peace or some alliance: equal treaties of peace are those which stipulate restitutions of captives and captures on both sides, and mutual security. Equal treaties of alliance either pertain to commerce, or to alliance in war, or to other matters. Equal treaties on the subject of commerce may be various, for instance, that no import duties be paid on either side,

rebus captis, et ad securitatem conveniri solent, qua de re agendum erit infra in belli effectibus et consectaneis. Æqualia societatis, aut ad commercia pertinent, aut ad belli communitatem, aut ad res alias. Æquales de commerciis pactiones variæ esse possunt, puta utrinque ne vectigal ullum solvatur, quod in vetere erat federe Romanorum et Carthaginiensium, excepto eo quod scribæ et præconi dabatur, aut ne majus solvatur quam in præsens, aut ad certam quantitatem.

3 Sic et in bellica societate ut auxilia præstentur paria equitum, peditum, navium, sive ad omne bellum, quod Græci [i]*ξυμμαχίαν* vocant, et explicat Thucydides *τοὺς αὐτοὺς ἐχθροὺς καὶ φίλους νομίζειν, eosdem hostes et amicos habere:* Lib. iii. 75.
quod et apud Livium sæpe reperias, sive ad tuendos fines duntaxat, quod *ἐπιμαχίαν*, sive ad certum bellum, aut in certos hostes, aut in omnes quidem, sed exceptis sociis, ut in federe inter Pœnos et Macedonas, quod apud Polybium est; Lib. vii. 2.
quomodo et Rhodii Antigono et Demetrio per fedus auxilia promiserunt in hostes quosvis, excepto Ptolemæo. Plut. *in Demet.* p. 899 A.
Potest, ut diximus, æquale fedus et ad res alias pertinere, [k]ut ne in

quod huc tendit, quamquam alio modo, pag. 79 c. *Ed. Basil.* 1572. Error autem huc translatus e *Mari Libero*, cap. 13. *init.* ubi dudum locus ita ab Auctore laudatus fuerat. *J. B.*

[i] *Ξυμμαχίαν vocant*] Veteres *ὁμαιχμίαν*. Zosimus, Lib. v. c. 42. [Vox autem *ἐπιμαχία* reperitur eo sensu, quo Auctor noster exponit, apud Thucyd. I. 44. Adde de his omnibus Andr. Dounæi Prælection. in Demosthen. Orat. Philipp. *De Pace*, pag. 135, *et seqq. J. B.*]

[k] *Ut ne in confinio alterius alter arces habeat*] Exemplum vide apud Procopium *Persicorum* I. (Cap. 2.)

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which was the agreement in the old treaty of the Romans and Carthaginians, except what was paid to the harbour-master and the public crier; or that no duties be paid greater than at present, or greater than a certain rate.

3 In alliances for war, the terms may be, that each side supply equal forces of infantry, cavalry, and ships: either for the whole war, which the Greeks called *Symmachia*, and which Thucydides explains *to have the same friends and the same enemies:* as also in Livy; or for defensive purposes only, which was *Epimachia;* or for a certain war, or against certain enemies, or against all, excepting allies, as in the league between the Carthaginians and Macedonians, in Polybius; so also the Rhodians by treaty promised aid to Antigonus and Demetrius against all, except Ptolemy.

An equal treaty may also, as we have said, pertain to other matters; as that neither shall have fortresses within the boundaries of the other;

confinio alterius alter arces habeat, ne subditos alterius alter defendat, ne iter alterius hosti præbeat.

VII. 1 Ex æqualibus qualia sint inæqualia facile est intelligi. Promittuntur autem inæqualia aut ex parte digniori, aut ex minus digna. Ex parte digniori, ut si quis auxilia promittat nec restipuletur, aut majora promittat: Ex parte indigniori inæqualia, aut ut Isocrates dicto Panegyrico loquitur, *τὰ τοὺς ἑτέρους ἐλαττοῦντα παρὰ τὸ δίκαιον*, sunt ea quæ diximus *προστάγματα* aut *ἐπιτάγματα* vocari. Et hæc ipsa aut cum imminutione sunt imperii, aut sine ejus imminutione.

Liv. xxx. 37. 2 Cum imminutione imperii, ut in secundo federe Carthaginiensium cum Romanis, ne cui Carthaginienses bellum facerent, injussu populi Romani. Ab eo tempore, ut Appianus loquitur, *Καρχηδόνιοι Ῥωμαίοις ὑπήκουον ἔνσπονδοι*, *Carthaginienses Romanis ex federe morem gerebant.* Potest addi huic generi deditio conditionata, nisi quod illa non imminutionem, sed translationem totius imperii continet, qua de re diximus alibi. Talem autem conventionem federis nomine et alibi Livius appellat, ut libro IX. *Theates Apuli impetraverunt ut fedus daretur, neque ut æquo tamen federe, sed ut in ditione populi Romani essent.* (Cap. 20.)

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that neither shall defend the subjects of the other; that neither shall give passage to the enemies of the other.

VII. 1 From the explanation of what are equal conventions, it is easily understood what are unequal. Unusual Treaties are either proposed by the superior party, or by the inferior. By the superior, as if he promises assistance without any reciprocal stipulation: by the inferior, when there is an inferiority of claim, are what we have spoken of as Conventions of Command. And these are either without infringement of the sovereignty of the inferior, or such as infringe it.

2 Such as infringe the sovereignty, as in the second treaty of the Romans with the Carthaginians, that the latter should not make war without the permission of Rome: from that time, as Appian says, the Carthaginians were by treaty submiss to Rome.

To this class we might add surrender on conditions, except that this contains, not an infringement, but a transfer of the sovereignty, of which we have spoken elsewhere. Such a convention Livy calls *fedus* in the case of the Apulian Theates.

3 In unequal treaties made without infringement of the sovereignty, the burthens imposed on the inferior are either transitory or

3 Sine imminutione imperii onera aut transitoria sunt, aut manentia. Transitoria, de solvendo stipendio, de mœnibus diruendis, ut locis quibusdam decedatur; ut dentur obsides, elephanti, naves. Manentia, ut de imperio ac majestate comiter colenda, cujus federis quæ sit vis alibi diximus. Huic proximum est ut hostes et amici habeantur quos velit partium altera: ne cui exercitui, cui cum altero bellum sit, per fines transitus commeatusve detur. Tum illa minora, ne arces certis locis ædificare, ne exercitum ducere, ne naves habere ultra numerum definitum, ne urbem condere, ne navigare, ne militem certis locis conscribere liceat: ne socios oppugnare: ne commeatu hostes juvare: ne recipere eos qui aliunde veniunt: ut federa prius facta cum aliis dirimantur: quorum omnium exempla apud Polybium, Livium, et alios videre est.

4 Solent autem federa inæqualia contrahi, non tantum inter victores et victos, ut Menippus censebat, sed et inter potentiores et impotentiores, etiam qui bello inter se experti non sunt. Apud Liv. *ubi sup.* xxxiv. 57.

VIII. De federibus frequens est quæstio, licitene incantur cum his qui a vera Religione alieni sunt: quæ res in jure naturæ dubitationem non habet. Nam id jus ita omnibus

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permanent: Transitory, as the payment of a subsidy, the dismantling of strong towns, the withdrawing from certain places; the giving up hostages, ships, elephants: Permanent, as the paying deference to the authority and majesty of the superior; of which engagement I have elsewhere spoken. Nearly of the same kind is the engagement to have for enemies and for friends those whom the other party shall prescribe; not giving passage or provisions to a party with whom the other is at war. And the smaller matters; not building forts in certain places, not having a moveable army, not having ships beyond a certain number, not founding a city; not navigating; not raising soldiers in certain places, not attacking allies, not supplying provisions to the enemy; rescinding treaties before made with other parties: of all which we may find examples in Polybius, Livy, and others.

4 Unequal treaties may be made not only between the conqueror and the conquered, as Menippus thought, but between the more and the less powerful who have never been at war.

VIII. It is often made a question whether it is lawful to make treaties with those who are strangers to the true Religion; which point in Natural Law is open to no doubt. For that Law is so far

hominibus commune est, ut Religionis discrimen non admittat. Sed de jure divino quæritur, ex quo hanc quæstionem tractant [1]non Theologi tantum, sed et Jurisconsultorum nonnulli, inter quos Oldradus et Decianus.

Thom. 2, 2. q. 10. art. 9. Oldr. *cons.* 71. Decian. iii. *cons.* 20.

IX. 1 Videamus primum de jure divino veteri, acturi deinde de novo. Fedus, non nocendi causa, cum alienis a Religione contrahere ante Mosis legem licuit. Exemplum est in federe Jacobi cum Labane: ut jam de Abimeleco nihil dicam, quando non satis constat eum fuisse idololatram. Neque id lex per Mosem data mutavit. Exemplo sint Ægyptii, haud dubie tunc idololatræ. Hos tamen aversari vetantur Hebræi. Excipiendi sunt populi septem divina sententia damnati, cujus sententiæ executores erant delegati Israëlitæ; nam his in idololatria perstantibus, et imperium detrectantibus, parcere vetantur, quibus itidem decreto divino additi sunt Amalecitæ.

Gen. xxxi. 44. *Gen.* xxvi. 28, 29. *Deut.* xxiii. 7. *Deut.* vii. 1, *et seqq.* *Deut.* xxv. 17, *et seqq.*

2 Federa quoque commerciorum, et quæ his similia ad utilitatem communem, aut alterius partis pertinent, inire cum profanis licet per legem: nihil enim reperitur quod obstet. Et exempla habemus federum, quæ David et Solomo cum Hiromo Tyriorum rege fecerunt: ac notandum in sacra historia dici fedus hoc a Solomone factum juxta sapientiam quam Deus ei dederat.

2 *Sam.* v. 11. 1 *Reg.* v. 12.

3 Lex quidem Mosis specialiter imperat benefacere popularibus, ἀγαπᾶν τὸν πλήσιον· præterea peculiaris victus et morum ratio Judæis præscripta familiarem cum hominibus ceteris consuetudinem vix patiebatur. At hinc non sequitur aut benefacere extraneis non licuisse, aut etiam laudabile id non esse, quod male inde collegit posteriorum magistrorum

Lev. xix. 18, et *Deut.* xxii. 1.

[1] *Non Theologi tantum*] Puta Antoninus, Cajetanus, Toletus, Molina, Valdesius, Malderus.

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common to all men that it recognizes no distinction of Religion. But the question is put on the ground of the Divine Law, and so treated, not only by Theologians but by Jurists, and among them, by Oldradus and Decianus.

IX. 1 First of Divine Law. We have examples of covenants for mutual forbearance, with strangers to true Religion, before the law of Moses, as Jacob with Laban, not to speak of Abimelech. The law of Moses did not change this: for example, the Hebrews are forbidden to treat the Egyptians as enemies. The seven Peoples of

prava interpretatio: unde illud Juvenalis de Judæis, (*Sat.* xiv. 103):

Non monstrare vias eadem nisi sacra colenti.

quo loco exemplum monstrandæ viæ minime molesta neque sumtuosa beneficia indicat quæ ignotis etiam tribuenda Cicero dicit et Seneca. Eodem pertinet Taciti illud de iisdem: *Apud ipsos fides obstinata, misericordia in promptu, adversus omnes alios hostile odium.* Sic in novi federis historia legimus sæpe, non solitos Judæos convivere *συγχρῆσθαι, συνεσθίειν, κολλᾶσθαι, προσέρχεσθαι* alienigenis. Et Apollonius Molo Judæis objiciebat, *ὅτι μὴ παρεδέχοντο τοὺς ἄλλαις προκατειλημμένους δόξαις περὶ Θεοῦ, μηδὲ κοινωνεῖν ἤθελον τοῖς καθ' ἑτέραν συνήθειαν βίου ζῇν προαιρουμένοις· non admitti ab eis qui de Deo sentirent alia, nec quicquam ipsis commune esse cum his qui institutis differrent:* Amici Antiochi apud Diodorum Judæos accusant: *μόνους ἁπάντων ἐθνῶν ἀκοινωνήτους εἶναι τῆς πρὸς ἄλλο ἔθνος ἐπιμιξίας, καὶ πολεμίους ὑπολαμβάνειν πάντας· solos ex omnibus populis insociabiles esse extraneis, ita ut ceteros pro hostibus ducant.* Sequitur de iisdem: *μηδενὶ ἄλλῳ ἔθνει τραπέζης κοινωνεῖν τὸ παράπαν, μηδὲ εὐνοεῖν, cum nulla gente alia mensam habere communem, neque bene eos aliis velle.* Mox eis tribuitur *μισανθρωπία, odium humani generis.* Et apud Philostratum, Tyanensis de Judæis: *οἱ βίον ἄμικτον εὑρόντες, οἷς μήτε κοινὴ πρὸς ἀνθρώπους τράπεζα· vitæ genus adeo secretum ab humano commercio repererunt, ut ne mensam quidem cum aliis communem habeant.* Sicut et passim Judæis apud Josephum objicitur, *τὸ ἄμικτον, τὸ ἀσύμφυλον, ἡ διαίτης ἀμιξία, insociabilis vivendi ratio.*

De Offic. i. 16. *De Benef.* iv. 29. *Hist.* v. 5. *Joan.* iv. 9. *Act.* x. 28; xi. 3; *et alib.* Apud Joseph. Lib. ii. *contr. Apion.* c. 36. p. 492. *Eclog.* ex Lib. xxxiv. apud Phot. *Vit. Apol. Tyan.* v. 33.

4 At hunc non esse legis sensum Christus nos docuit

Canaan are an exception, on account of their obstinate idolatry.

2 Treaties of commerce, and the like, may be made with such persons: so David and Solomon with Hirom king of Tyre.

3 The Law of Moses separates the Jews from the rest of mankind. But that the Jews were not to do good to other nations, was a perverse interpretation of later masters. See Juvenal, Cicero, Seneca, Apollonius Molo, Diodorus, Philostratus, Josephus.

4 This was not Christ's interpretation. Also, see David's intercourse with strangers: and Solomon's.

Joan. iv. 7. exemplo suo, cum a Samaritide femina aquam accipere non
1 Sam. xxvii. *etc.* recusavit, legis ubique observantissimus. Sed et olim David apud populos irreligiosos perfugium sibi quæsiverat, nusquam
Ant. viii. 2. p. 265. eo nomine reprehensus. Apud Josephum Solomoni templum dedicanti, et oranti ut Deus ibi etiam alienigenarum preces exaudiret, hæc tribuitur oratio: *ἡμεῖς οὐκ ἀπάνθρωποι τὴν φύσιν ἐσμὲν, οὐδὲ ἀλλοτρίως πρὸς τοὺς οὐχ ὁμοφύλους ἔχομεν· non sumus inhumano ingenio neque male affecti erga extraneos.*

5 Excipiendi ab hac regula non illi tantum populi quos supra diximus, sed insuper Ammonitæ et Moabitæ, de quibus scriptum est Deut. xxiii. 6. *Non quæres prosperitatem eorum* (ita rectius hoc loco verteris שלמם quam pacem eorum) *nec bonum eorum ullis diebus tuis unquam.* Quibus verbis federa benefica cum illis populis vetantur, non etiam jus belli conceditur: aut certe, quæ Hebræorum quorundam sententia est, vetatur pax ab illis peti, non etiam oblata accipi. Certe jus
Jud. xi. 16. belli in Ammonitas Hebræis negatur Deut. ii. 19: neque Jephthes arma in eos movit, nisi post tentatas æquæ pacis vias,
2 Sam. x. neque David nisi atrocibus injuriis lacessitus. De societate bellica quæstio superest.

6 Ante legem, hanc quoque non illicitam fuisse cum pro-
Gen. xiv. fanis gentibus, exemplo apparet [m] Abrahami, impios Sodomitas bello adjuvantis. Nec lege Mosis quicquam generaliter hac in re mutatum legitur. Atque ita videmus sensisse [n] Asmonæos, legis et peritos et reverentes admodum, ut ex religiosa sabba-

[m] *Abrahami*] Idem cum Escole et Anero fœdus fecit. (Gen. xiv. 13.) Sic et David cum Achi et Naaso, Solomon cum Ægyptiis, Asa cum Benadado. [Vide I. Sam. xxvii. II. Sam. x. 2. I. Reg. iii. 1. et xv. 19.]

[n] *Asmonæos legis et peritos et reverentes admodum*] Laus eorum est in Thargumo Chaldaico, in libris Maccabaicis, in epistola ad Hebræos. Horum exemplum secuti Imperatores et reges Christiani federa aut cum non Christianis, aut cum non sane Christianis fecere, Constantinus cum Gothis et Vandalis, Justinianus cum Longobardis: cum Saracenis, Alanis, Gepidis, Francis, Suevis, Vandalis, Theodosius, Honorius, Leo, Heraclius, Basilius, Isaacius Angelus, Palæologus: cum Mauris reges Hispaniæ Alfonsus Hispalensis, Ramirus,

5 Besides the exception of the Peoples of Canaan, the Ammonites and Moabites also are excepted. Beneficial leagues with them are forbidden, but war is not authorized. See the passages.

6 See also the example of Abraham and his league with the king of Sodom. And the Maccabees made leagues with Greeks and Romans.

thi observatione, permissa sola sui tutela, non alio armorum usu, apparet. Et hi tamen cum Lacedæmoniis et Romanis fœdus pepigere, approbantibus sacerdotibus et populo; imo pro eorum salute sacra publice fecerunt. Quæ vero contra adferuntur, causas habent peculiares. *1 Macc.* viii. et xii.

7 Nam si quos reges aut populos, extra eos qui in lege expressi erant, exosos sibi et infortunio damnatos per Prophetas Deus significasset, eorum tutelam suscipere aut cum iis arma sociare haud dubie nefas erat. Huc illud pertinet Prophetæ [o]ad Josaphatum de rege Israëlis: *Te ne improbo opitulari, et eos diligere* [p]*qui Deum oderunt? At ob hoc ipsum exarsit in te Dei ira.* Nam infelicem belli exitum Micheas propheta jam ante prædixerat. Et alterius prophetæ ad Amasiam: *Ne ito tecum exercitus Israëlitarum: nam non adest Deus Israelitis, ulli inquam Ephraimitarum.* Hoc vero non venire ex natura federis, sed ex personæ peculiari quadam qualitate, vel hinc evincitur, quod graviter increpitus est Josaphatus, etiam diris additis, eo nomine quod commercii causa societatem iniisset cum Ochozia rege Israëlitarum, similem ei, quam David et Solomo inierant cum Hiramo, quos eo nomine partim non reprehensos, partim laudatos diximus. Nam quod additur Ochoziam impie egisse, debet ad totam ejus vitam referri, ob quam Deus ipsi omnibusque ejus conatibus infensus fuerit: quomodo hæc historia explicatur in libro, cui nomen Constitutiones Clementis VI. capite xviii. *2 Paral.* xix. 2. *Ibid.* xxv. 7. *Ibid.* xx. 37.

Alfonsus Castus, Sanctius Castellæ, Ferdinandus cognomine Sanctus: Petrus Legionis rex: Alfonsus Castellæ rex prudentissimus: cum Tartaris Rodolphus Habspurgensis. Adi Johannem de Carthagina libro III. *de Jure Belli Romani Pontificis* c. 1. Julius II. Pontifex Turcis usus.

o *Ad Josaphatum*] Josephus: ᾐτιᾶτο τὴν πρὸς Ἄχαβον συμμαχίας ἄνθρωπον ἀσεβῆ καὶ πονηρόν. *accusabat eum societatis initæ cum Achabo homine impio ac scelerato.* (*Antiq. Jud.* IX. 1. § 1. *Edit. Huds.*)

p *Qui Deum oderunt*] Gratianus Valenti patruo contra Scythas opem petenti scripsit, ὡς οὐ δεῖ τῷ ἐχθρῷ τοῦ Θεοῦ συμμαχεῖν· *fas non esse socialia arma jungere cum eo qui Dei sit hostis.* Zonaras (Lib. XIII. cap. 17.)

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7 If any kings or peoples were condemned to destruction by God, doubtless it was then unlawful to protect them or to join with them. So 2 Chron. xix. 2, Jehu the prophet says to Jehoshaphat, *Shouldest thou help the ungodly, &c.?* So 2 Chron. xxv. 7 to Amaziah. But this was on account of personal considerations, not the nature of the treaty, as appears by the circumstances: [which see.]

8 Notandum et hoc, pejorem fuisse causam eorum qui a Jacobo orti Deum bene cognitum deseruerant, quam populorum extraneorum. Nam in defectores illos ceteri populares armabantur [q] lege quæ exstat Deut. xiii. 13.

9 Est et ubi culpantur federa, ob animi vitium unde procedebant; ita a Propheta reprehensus Asa, quod ad societatem Syri se contulisset Deo diffisus: quod ostenderat cum res Deo sacratas ad Syrum mitteret. Sed nempe Rex idem culpatus quod in medicis spem posuisset, non in Deo. Non ergo ex hac historia magis sequitur, per se aut generaliter malum esse societatem contrahere cum talibus quales erant Syri, quam medicos consulere. Multa enim non illicita vitiat animus, ut censum in Davide, thesaurorum ostensionem in Ezechia. Sic alibi fiducia in Ægyptio posita reprehenditur, cum tamen Solomoni cum Ægyptio affinitatem contrahere licuerit.

2 Paral. xvi. 2, 7. *Esai.* viii. 6. *Ibid.* xvi. 12. Ambr. *ad Rom.* cap. 3. *Auct. Imper. Op. ad Matt.* c. xvi. *2 Sam.* xxiv. *2 Reg.* xx. 13. *Esai.* xxxi. 1. *1 Reg.* iii. 1.

10 Quibus et hoc addendum est, Hebræos sub statu legis veteris disertas habuisse promissiones victoriæ si legem observarent, quo minus recurrendum habebant ad humana auxilia. Exstant quidem et apud Solomonem sententiæ non paucæ, de vitandis consortiis impiorum. Sed hæc prudentiæ monita sunt, non legis præcepta: et illa ipsa monita, ut moralia pleraque, plurimas habent exceptiones.

Deut. xxviii. 7. *Prov.* i. 15; xiii. 20; xxii. 24; xxiv. 1.

X. 1 Lex autem Evangelii nihil hac in parte mutavit: imo magis etiam favet federibus, quibus hi, qui a Religione alieni sunt, in causa justa sublevantur, quia beneficentiam in quosvis homines, data occasione, non liberam modo reliquit et laudabilem, sed et sub præcepto posuit. Nam Dei exemplo, qui solem oriri facit bonis et malis, et pluvia utrosque humectat, jubemur nullum hominum genus a beneficiis nostris exclu-

Vict. *de Indis. relect.* 1. n. 15. et 17. Franc. Arius *de Bell.* n. 192. Cajet. 2, 2. q. 40. art. 1. Molin. *tract.* 11. *disp.* 112. *Matth.* v. 45.

[q] *Lege quæ exstat* Deut. xiii. 13.] Adde exemplum Josuæ c. xxii.

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8 Observe that the case was worse with the Ten Tribes, who, though descended from Jacob, had deserted God, than with others.

9 Sometimes also treaties are condemned on account of the bad motive from which they proceeded. Thus, 2 Chron. xvi. 2, Asa's league with the Syrians. So other kings sinned. And trust in Egypt is condemned; but Solomon made a league with Egypt.

10 Moreover the Hebrews had a promise of success if they obeyed the law, and so did not need human aid. Solomon's precepts in the Proverbs about shunning the fellowship of the wicked

dere. Bene Tertullianus: *Quamdiu intra Israelem erat sacramentum, merito in solos fratres misericordiam mandabat. At ubi Christo dedit gentes hereditatem et possessionem terminos terræ, et cœpit expungi quod dictum est per Osee: Non populus meus populus meus, et non misericordiam consecuta misericordiam consecuta, Natio scilicet; exinde Christus in omnes legem fraternæ benignitatis extendit, neminem excludens in miseratione, sicut in vocatione.* Adv. Marc. iv. 16.

2 Quæ accipi oportet salva gradus differentia, ut in omnes simus benefici, præcipue tamen in religionis consortes. In Gal. vi. 10. Clementis constitutionibus legimus: πᾶσιν οὖν δίκαιον διδόναι Lib. vii. 11. ἐξ οἰκείων πόνων· προτιμητέον δὲ τοὺς ἁγίους· *Omnibus largiendum de nostra opera: sed ita ut sanctorum potior habeatur ratio. Perfecta liberalitas*, inquit Ambrosius, *fide, causa, loco, tempore commendatur, ut primum opereris circa domesticos fidei.* Offic. i. 30. Simile est illud Aristotelis: οὐ γὰρ ὁμοίως Nic. iv. 52. προσήκει συνήθων καὶ ὀθνείων φροντίζειν· *Neque enim par est æqualem curam subiri pro externis et pro amicis.*

3 Convictus etiam familiaris cum hominibus, qui alieni sunt a Religione, non prohibetur: ac ne cum illis quidem, quorum pejor causa est, et qui a disciplinæ Christianæ regula deficiunt, omne interdicitur commercium, sed familiare extra necessitatem, non etiam quod emendandis ipsis spem præbet. 2 Thess. iii. 15. Illud vero quod apud Paulum est, *Ne jugum ducite cum* 2 Cor. vi. 14. et seqq. *alienis a fide: quod enim consortium est justitiæ cum iniquitate, aut quæ commixtio est luci cum tenebris, aut quæ concordia est Christo cum Satana, aut quæ pars credenti cum non credente?* ad eos pertinet qui in idoliis convivabantur, atque ita aut idololatriam committebant, aut certe committentium speciem præbebant. Ostendunt sequentia: *Quæ consensio templo Dei cum idolis?* similia illis quæ in priore ad 1 Cor. x. 21.

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belong to private prudence, not to public policy, and admit of many exceptions.

X. 1 The Gospel changed nothing in this matter: it rather favours conventions with all men that we may do them good: as God makes his sun to rise on the just and on the unjust. So Tertullian.

2 Which must be taken with a difference, that we are to do good to all, but specially to those who are our partakers in religion. See the Clementine Constitutions, Ambrose, Aristotle.

3 Familiar intercourse is not forbidden with strangers to Religion, nor even those who have gone back from religion; but only unneces-

Corinthios eosdem: *Non potestis fieri participes mensæ Domini et mensæ dæmoniorum.*

4 Neque ab eo quod subeunda sponte non sunt profanorum imperia, nec conjugia cum eis contrahenda, recte procedet argumentum. Nam in utroque hoc casu apparet majus periculum, aut certe plus difficultatis injici veræ Religionis usui. Adde quod magis perpetua sunt ista vincula: et in matrimonio liberior electio, cum federa ex temporum et locorum occasione sumenda sint. Sicut autem benefacere profanis malum non est, ita nec opem eorum implorare, sicut Cæsaris et Tribuni auxilium Paulus invocavit.

Sylv. *Verb. Bell.* i. n. 9. *concl.* 3. Pan. *in c. Quod sup. de voto.*

XI. 1 Nulla ergo hic intrinseca aut universalis est pravitas, sed [r] ex circumstantiis æstimanda. Cavendum enim ne nimia commixtio contagium adferat infirmis; quam ad rem utile erit sedes distingui, sicut Israëlitæ seorsim ab Ægyptiis habitarunt. Neque enim ratione caret illud Anaxandridæ:

Apud Athen. vii. 13. p. 299, 300.

Οὐκ ἂν δυναίμην συμμαχεῖν ὑμῖν ἐγώ.
Οὔθ' οἱ τρόποι γὰρ ὁμονοοῦσ', οὔθ' οἱ νόμοι
Ἡμῶν· ἀπ' ἀλλήλων δὲ διέχουσιν πολύ.

Ego esse vester non queam commilito,
Quando nec leges, nec mores consentiunt,
Sed multis inter se intervallis discrepant.

[r] *Ex circumstantiis æstimanda*] Vide orationem Phartazæ ad Lazos apud Agathiam III. (cap. 5.) Saxo libro IX. in verbis Ludovici regis Francorum ad Haraldum: *Nullam posse animorum intervenire concordiam dissona sacra complexis: quamobrem petitorem opis primum religionis contubernio opus habere, neque magnorum operum consortes existere posse, quos supernæ venerationis*

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sary familiarity. St Paul's warnings, 2 Cor. vi. 14, &c. refer to idolatry, as appears by what follows, and by 1 Cor. x. 21.

4 Nor does the proof follow, because we are not willingly to come under the authority of the impious, or to contract marriage with them. For such steps produce much more danger to religion, and are more permanent, and more free; while treaties depend on occasion of time and place. And as we may benefit the profane, so we may ask their help, as Paul claimed the help of Cæsar and of the chief Centurion.

XI. 1 Hence in an alliance with those of a false religion, there is no inherent or universal pravity: the case is to be judged by the circumstances. But care is to be had that too much mixture with them do not taint the weak. For which purpose, separate habitation is good, like that of the Israelites in Egypt. So Anaxandrides. And to this pertain what we have said of Jews and Christians serving as

Quo pertinent et ea quæ alibi attulimus de religione Judæo- Lib. i. 2. § 9. n. 3.
rum et Christianorum in commilitio cum paganis.

2 Sed et si ex societate tali profanæ opes magnum sint habituræ incrementum, abstinendum erit extra summam ne- Sylv. *in Verb. Bell.* p. 1. n. 9. concl. 3.
cessitatem: In qua locum habet, quod in simili re dixit Thucydides: *ἀνεπίφθονον δὲ, ὅσοι ὥσπερ καὶ ἡμεῖς ὑπὸ τῶν* Lib. i. 82.
Ἀθηναίων ἐπιβουλευόμεθα, μὴ Ἕλληνας μόνον, ἀλλὰ καὶ βαρβάρους, προσλαβόντας διασωθῆναι· His qui insidiis impetuntur, ut nos ab Atheniensibus, invidia fieri non debet si salutem quærunt non Græcorum modo sed et barbarorum auxiliis. Non enim jus quodvis sufficit ad id committendum, quod religioni, si non directe, indirecte tamen nociturum putetur. Quærendum enim primo loco est regnum cœleste, id *Matth.* vi. 33.
est, Evangelii propagatio.

3 Optandum esset, ut multi hodie principes ac populi in animum admitterent liberam et piam vocem Fulconis Archiepiscopi quondam Remensis, Carolum Simplicem sic admonen- Frod. l. iv. *Hist. Rem.* c. 6.
tis: *Quis non expavescat vos* [s] *inimicorum Dei amicitiam velle, ac in cladem et ruinam nominis Christiani pagana arma et fœdera suscipere detestanda? Nihil enim distat utrum quis se paganis societ, an abnegato Deo idola colat.* Exstat apud Arrianum dictum Alexandri: *ἀδικεῖν μεγάλα* Lib. i. 17.
τοὺς στρατευομένους ἐναντία τῇ Ἑλλάδι παρὰ τοῖς βαρβά-

formula disparasset. (Lib. IX. pag. 158. *Edit. Wech.* 1576.)

[s] *Inimicorum Dei amicitiam velle*] Exemplum in Mancafa apud Nicetam rebus Isaaci Angeli Lib. II. cap. 3. Prædicatur pietas Emanuelis ducis Sabaudiæ, qui Cyprum ope Turcæ recuperare cum posset, noluit.

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soldiers with heathens.

2 But if the strength of the profane is likely thus to be much increased, we must abstain from such alliances, except in case of necessity: such as Thucydides speaks of. [See.] For it is not mere right which justifies men in doing what may indirectly harm religion. We must seek first the kingdom of God, that is, the propagation of the Gospel.

3 It were to be wished that many princes and peoples would lay to heart that liberal and pious saying of Fulk, Archbishop of Rheims, who thus admonished Charles the Simple: *Who is not alarmed when you seek the friendship of the enemies of God; and invite the co-operation and the arms of pagans for the calamity and ruin of the Christian name? It makes no difference whether any one joins himself with pagans, or denies God and worships idols.* There is in Arrian a saying of Alex-

ροις, παρὰ τὰ δόγματα τὰ τῶν Ἑλλήνων· *graviter eos delinquere qui adversum Græcos Barbaris militarent, contra Græcorum jura.*

1 Cor. xii. 18, 26. XII. Illud hic addam, cum omnes Christiani unius corporis membra sint, quæ jubentur alia aliorum dolores ac mala persentiscere, sicut id ad singulos pertinet, ita et ad populos qua populi sunt, et ad reges qua reges pertinere. Neque enim pro se quisque tantum, sed et pro mandata sibi potestate servire Christo debet. Hoc autem præstare reges et populi non possunt, grassante armis hoste impio, [t]nisi alii aliis auxilio sint: quod commode fieri nequit, nisi fedus eo nomine ineatur: quod fedus jam olim initum fuit, et princeps ejus creatus consensu communi Romanus Imperator. Debent ergo Christiani omnes ad causam hanc communem pro virium modo viros aut pecunias conferre: quod quominus faciant non video quomodo possint excusari, nisi si qui bello inevitabili, aut non dissimili malo domi distinentur.

XIII. 1 Solet sæpe et illa incidere quæstio, si plures bellum gerant, utri potius opem ferre debeat qui utrique est federatus. Hic primum sciendum est, quod et supra diximus, ad

[t] *Nisi alii aliis auxilio sint*] Ad hanc rem vide Marianam libro XXX. cap. 23. Parutam libro IV. Bizarum VII. et XII.

[u] *Qui federatorum justam habet belli causam præferendus*] Vide infra libro II. c. XXV. § 4. In fidelitate Feudali dicitur: *Et si scivero velle te aliquem juste offendere, et inde generaliter vel specialiter fuero requisitus, meum tibi, sicut potero,*

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ander, that *Those grievously offend who enter the service of Barbarians to fight against Greeks and Grecian rights.*

XII. Add that all Christians are members of one body; are commanded to bear each other's sufferings and sorrows: and as this applies to individuals, so does it to peoples, as peoples, and to kings, as kings. Each must serve Christ according to the power given him. But this they cannot do, when the infidel is powerful, except they help each other: and this cannot well be done except a general league be made with that view. Such a league has been made, and the head of it created by common consent Roman Emperor*. Therefore all Christians ought to aid in this cause according to their power with men or money: nor do I see how they can be excused, except they be detained at home by an inevitable war or some similar evil.

XIII. 1 The question often arises, if several parties carry on

* Frederic III., A.D. 1461, says Gronovius; and refers to *Boecleri.* Disputatio *de Passagiis.*

injusta bella nullam esse obligationem. Quare [u]qui federatorum justam habet belli causam præferendus, si cum extraneo res sit. Etiam si cum alio federato: Sic oratione de Megalopoli ostendit Demosthenes, Messeniis sociis contra Lacedæmonios item p. 83 c.
socios opem ferri ab Atheniensibus debere, si ab his incipiat injuria. Sed id ita verum; nisi convenerit hoc quoque ne adversus eum auxilia mittere liceat. In pactione Hannibalis cum Macedonibus erat: *Hostium hostes erimus, exceptis regibus,* Polyb. vii. 2.
civitatibus, et portubus quibuscum fedus nobis et amicitia est.

2 Quod si federati inter se committantur causis utrinque injustis, quod accidere potest, utraque parte abstinendum erit. Sic in Leuctrica Aristidis quinta dicitur, *εἰ μὲν ἐπ' ἄλλους ἐκάλουν, ῥᾳδίως ἄν. ἐπ' ἀλλήλους δὲ καλούντων, οὐκ ἐθέλειν παρεῖναι·* [w]*si quidem in alios auxilium poscerent, facile esse negotium: sin sociorum alter in alterum, nolle se misceri.*

3 Quod si federati in alios bellent justa quisque de causa, si utrique auxilia mitti possunt, puta in milite aut pecunia, mittenda erunt, ut fit circa creditores personales. At si ipsius qui promisit præsentia requiritur, quæ individua est, ratio postulat [x]ut præferatur cum quo antiquius est fedus; quod

præstabo auxilium. (*Feud.* II. 7.)

[w] Locus est Tom. II. pag. 220. *Ed. Paul. Steph.* sed ubi, si expendatur series orationis, manifesto patebit agi, non de justitia aut injustitia belli, sed de eo quod prudentia postulabat. *J. B.*

[x] *Ut præferatur cum quo antiquius est fedus*] Vide *de Feudis*, Lib. IV. cap. 31. [Secundum divisionem Cujacii: at Lib. II. tit. 28. in fin. *Ed. Vulg.*]

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a war, to which of two in preference ought he to give assistance who is under agreement with both. This is first to be understood, as we have said above, that no one is bound to unjust wars. Therefore that one of the allies who has a just cause is to be preferred, if the transaction is with a stranger: and also if it be with another of the allies. Thus Demosthenes, in the oration concerning Megalopolis, shews that the Athenians ought to assist the Messenians, who are their allies, against the Lacedæmonians, who are also their allies, if the wrong be on the side of the latter. In the treaty of Hannibal with the Macedonians, it stood, *We will be the enemies of your enemies, except the kings, states and ports with which we are in league and friendship.*

2 If two allies quarrel, being both in the wrong, which may happen, we are to take part on neither side. So Aristides.

3 But if two allies make war on others for just cause, if we can send aid to both, soldiers or money for example, we are to do so;

Lib. ix. 25. [7]Acarnanes Spartanis dicunt apud Polybium: eodemque pertinet Consulis Romani responsum Campanis datum: Liv. vii. 31. *amicitias ita institui par est, [8]ne qua vetustior amicitia ac societas violetur.*

Sylv. *in Verb. Bell.* p. 1. n. 7. 4 Sed addenda exceptio, nisi fedus posterius ultra promissionem aliquid habet, [2]quod quasi dominii translationem in se contineat, puta subjectionis aliquid. [6]Nam et sic in venditione dicimus priorem præferri, nisi posterior dominium transtulerit. Lib. vi. 10. Sic Nepesinis apud Livium deditionis, quam societatis, fides sanctior. Distinguunt hæc alii subtilius; sed quæ dixi, ut simpliciora, ita veriora arbitror.

[illegible] XIV. Finito tempore fedus tacite renovatum intelligi non debet, nisi ex actibus qui nullam aliam interpretationem recipiunt: non enim facile præsumitur nova obligatio.

[illegible] XV. Si pars una fedus violaverit, poterit altera a federe discedere: nam capita federis singula conditionis vim habent. [illegible] Exemplo sit illud apud Thucydidem: λύουσι τὰς σπονδὰς οὐχ οἱ δι' ἐρημίας ἄλλοις προσιόντες ἀλλ' οἱ μὴ βοη-

[7] Immo Ætoli, adversus Acarnanes, ore Chlæneæ Legati loquentes. Inspice locum, quem distinctius in margine indicavi. *J. B.*

[8] *Ne qua vetustior amicitia ac societas violetur*] Χρὴ φίλοις κατ' ἐχθρῶν συμμαχεῖν, οὐ κατὰ φίλων· *amicis auxilia ferenda contra hostes, non contra amicos*, dicit Ptolemæus Atheniensibus apud Appianum in legationum excerptis. [Sed alio pertinet hic locus, ut patet statim; nimirum ad casum, de quo su-

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as we are to pay several personal creditors. But if our individual presence, as having promised, be required, reason requires that he be preferred with whom the league is oldest: so the answer of the consul to the Campanians.

4 But an exception is to be added, if the later league contain, besides a promise, anything which contains a transfer of ownership, or a subjection to the other party. For thus in selling also, we say that the prior sale is valid, except the later sale transfer the ownership. So in Livy the Nepesini held their surrender more binding than their alliance. Others make more subtle distinctions, but I believe this, as most simple, to be also most true.

XIV. When the time is ended, the treaty ought not to be tacitly supposed renewed, except by acts which receive no other interpretation: for a new obligation is not lightly presumed.

XV. If one party violate the league, the other may withdraw from the agreement: for every article of the agreement has the force of a condition. Take two examples from Thucydides. [See.] But this is only true if it be not otherwise agreed, as is sometimes

θοῦντες οἷς ἂν ξυνομόσωσι· *Soluti federis culpam sustinent, non qui deserti ad alios se conferunt, sed qui quam jurati promiserant opem, re non præstant.* Alibi apud eundem: Lib. iv. 23.
ὅ, τι δ' ἂν τούτων παραβαίνωσιν ἑκάτεροι καὶ ὁτιοῦν, τότε λελύσθαι τὰς σπονδάς· *Sed si vel tantillum ex dictis pars alterutra transgrederetur, rupta fore pacta.* Sed hoc ita verum est, ni aliter convenerit: quod fieri interdum solet, ne ob quasvis offensas a federe discedere liceat.

XVI. 1 Sponsionum tot esse materiæ possunt, quot federum. Distant enim hæc personarum facientium potestate. Sed duo sunt quæ de sponsionibus quæri solent: [8]Primum si improbetur a rege aut civitate sponsio, in quid teneantur sponsores, ad id quod interest, an ad restituendam rem in eum statum, in quo erat ante sponsionem, an ad corpus dedendum. Prima sententia videtur juri civili Romano congruere: secunda æquitati, quam in Caudina controversia tribuni plebis L. Livius et Q. Mælius urgebant: tertia usu probata est, ut exemplis sponsionum duarum nobilium Caudinæ

pra, § 13. n. 1. in fine. Ceterum verba ipsa non reperio in Excerptis indicatis; et memoria heic videtur omnino fefellisse Auctorem. *J. B.*]

[z] *Quod quasi dominii translationem in se contineat*] Vide Radevicum II. 7.

[a] *Nam et sic in venditione*] Edicto Theodorici, c. 138.

[8] Confer PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. cap. ix. § 12, 13. *J. B.*

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done; that a withdrawal from the league is not to be justified by every slight offense taken.

XVI. 1 Sponsions, that is, conventions made on personal responsibility (see c. III.) may be as various in their subject-matter as public treaties. They differ in the power of those who make them. But there are two common questions concerning such conventions: First, if the convention be rejected by the king or the state, to what are the responsible parties bound? To give an equivalent; or to restore things into the state in which they were before the convention; or to give up their persons? The first course appears to be conformable to the Roman Civil Law; the second, to equity, as was urged by the Tribunes in the Caudine controversy; the third, to usage, as the conspicuous examples of the Caudine and the Numantian conventions shew*.

But the important point is, that the supreme authority is not bound to any one course. As Posthumius says: *You* (the people) *have made no convention with the enemy; you have not authorized any*

* Flor. I. 16, and II. 18. *Gronov.*

et Numantinæ apparuit. Sed illud ante omnia tenendum, eum qui summum imperium habet nullam in partem obligari. Liv. ix. 9. Bene enim Romanis Posthumius: *Hosti nihil spopondistis: civem neminem pro vobis spondere jussistis; nil ergo vobis nec nobiscum est, quibus nihil mandastis, nec cum Samni-* Ibid. *tibus, cum quibus nihil egistis.* Bene idem: *Injussu populi nego quicquam sanciri posse, quod populum teneat:* et hoc non minus recte: *si quid est, in quod obligari populus possit, in omnia potest.*

2 Ergo nec ad id quod interest, nec ad restitutionem populus tenebatur: cum quo si negotium sibi esse voluissent Samnites, retinere exercitum apud Furculas Caudinas debuerant, et Romam legatos mittere, qui cum Senatu ac populo de pace ac federe agerent, ut quanti ipsis esset exercitus incolumitas id ipsi æstimarent. [9]Tum demum si pactis statum non esset, potuissent dicere, quod et ab ipsis et a Numantinis

[9] Imprudenter quidem egerunt Samnites: sed non minus propterea violatæ fidei publicæ rei fuerunt Romani. Ostendit id Celeberrimus JCtus Hallensis, CHRISTIANUS THOMASIUS, Dissertatione singulari *De Sponsione Romanorum Caudina*, quæ sexta est inter Lipsienses. Plura diximus in Notis nostris Gallicis. *J. B.*

[b] *Milites omnes fuisse obligatos*] Sic Numantini, si sponsio non probaretur, exercitum sibi dedendum censebant, ea sponsione liberatum. [Hoc habere videtur ex Orosio, *Hist.* v. 5. Ceterum idem modo laudatus Clar. Thomasius de hac quoque *Sponsione Romanorum Numantina* Dissertationem scripsit, numero XIV. in eodem volumine. *J. B.*]

[c] *Fide sponsorum*] Ii erant consules duo, quæstores duo, præfecti IV. tribuni

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citizen to make a convention for you: you have nothing to do with us, to whom you gave no commission, nor with the Samnites, with whom you have had no transaction. He adds well: *I deny that without the permission of the people, any engagement can be made which binds the people:* and, also well: *If the people can be bound to anything* [by the acts of others] *it may be bound to all things.*

2 Therefore the People was not bound either to compensation or to restitution. If the Samnites wished to deal with the People, they ought to have kept the army at the Caudine Forks, and to have sent ambassadors to Rome, to treat with the Senate and People concerning peace, leaving them to estimate the safety of the army at what value they might. And then they might have said, what Velleius reports that they and the Numantines said, that the violation of public faith ought not to be deemed expiated by the blood of an individual.

3 With greater speciousness it might be said, that all the soldiers were bound by the treaty. And that would have been equitable, if

dictum ait Velleius, publicæ violationem fidei non debere unius lui sanguine.

3 Majori specie dici potest [b]milites omnes fuisse obligatos. Et certe æquum id esset, si ipsorum jussu ac nomine contractum foret a sponsoribus, ut in pacto quod Hannibal fecit cum Macedonibus factum videmus. Quod si [c]fide sponsorum et [d]sexcentorum, quos imperarunt, obsidum fuerunt contenti Samnites, habent quod sibi imputent. Rursum si sponsores præ se tulerunt potestatem publico nomine contrahendi, ex damno per dolum dato ad restitutionem tenebantur. Si id non apparet, tenebantur ad id quod intererat ex vi negotii ratum haberi. Et hoc casu non corpora tantum sed et bona sponsorum fuissent obligata Samnitibus, nisi pœnam vice ejus quod interest expressissent. Nam de obsidibus convenerat, ut capite luerent si pacto non staretur. De sponsoribus an eadem dicta sit pœna in obscuro est. Pœnæ autem stipulatio

XII. narrante Appiano (Excerpt. Legat. num. 3. pag. 442. *Fulv. Ursin.*) Hi omnes dediti ex Caudino sponsu: ex Numantino consul solus, ceteris parcitum, ob Tiberium Gracchum, ut in Gracchorum vita narrat Plutarchus, (pag. 827 A.)

[d] *Sexcentorum, quos imperarunt, obsidum*] Pontius filius apud Appianum: *τῶν τε ἱππέων ἐπιλέξομαι τοὺς ἐπιφανεστάτους, ὅμηρα τῶνδε τῶν συνθηκῶν, ἕως ἅπας ὁ δῆμος ἐπιψηφίζῃ· equitum potissimos deligam, qui obsides sint, donec populus pacta firmet.* Satis esse obsides tenentis arbitrio relinqui censuere Lusitani in re simili. Mariana XXI. 12. Qui deditos accipiunt, pœnam remittere censentur. Polybius Excerpto CXXII.

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the treaty had been negociated in their name, and under their direction, by the acting parties, as was done in the treaty of Hannibal with the Macedonians. But if the Samnites were content with the engagement of the persons negociating, and of the 600 hostages whom they demanded, they had themselves to blame. On the other hand, if the negociators pretended that they had the power of making a convention in the name of the public, they were bound to restitution, as having done damage by fraud. If that does not appear, they were bound to a reasonable compensation to the Samnites, according to the purport of the negociations. And in this case, not only the bodies, but also the goods of the negociators, were bound to the Samnites, except they had paid such a compensation as we have spoken of. For, with regard to the hostages, it was agreed that if the engagement did not stand, their lives were to be forfeited. Whether the same penalty was agreed upon for the negociators, does not appear. But the stipulation of a penalty affects what is done, in this way: that if the thing to be done cannot be performed, there is nothing else in the

tali modo facta efficit, ut si factum præstari nequeat, nihil aliud sit in obligatione: succedit enim certum loco incerti quod interest. Erat autem communis istorum temporum sententia, etiam vitam valide posse obligari.

4 Apud nos autem, qui aliter sentimus, existimo tali sponsione bona primum ad id quod interest, et si ea non sufficiant, corpus ad servitutem obligari. [e] Fabius olim Maximus cum pactum quoddam ejus cum hostibus factum senatus improbasset, fundum suum ducentis millibus vendidit, et fidei satisfecit. Samnites vero [f] Brutulum Papium induciarum ruptorem simul cum bonis suis dedendum recte censuerunt.

Script. de Vir. Ill. c. 43.

Plut. Fab. *Max.* p. 178. Liv. viii. 39.

XVII. 1 Altera quæstio est, an sponsio obliget summam potestatem ex notitia et silentio. Hic distinguendum primum an pure facta sit sponsio, an sub conditione si rata haberetur a summa potestate. Nam hæc conditio non impleta (debent autem conditiones diserte impleri) nullam facit sponsionem. Quod recte convenit in sponsionem Lutatii cum Pœnis: accedebat quod ea se populus, quia suo injussu facta

Liv. xxi. 19. Polyb. iii. 29.

[e] *Fabius olim Maximus*] Diodorus Siculus in excerptis Peirescianis, Valerius Maximus IV. c. viii. [Non Diodorus Siculus, sed Dion Cocceianus habet

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obligation [but the penalty]: for the penalty is introduced as something certain into the place of an uncertain compensation. And at that time the common opinion was, that a man's life might be seriously given as a pledge.

4 But with us who think differently, I am of opinion that by such a convention, first, the party's goods are liable for compensation of the interest affected, and if they are not sufficient, that his body is forfeited to slavery. When Fabius Maximus had made an agreement with the enemy, which the Senate repudiated, he sold his landed property for 200,000 sesterces, and made good the loss. And the Samnites rightly conceived that Brutulus Papius, who broke a truce, should be given up along with his property.

XVII. 1 Another question is, whether a convention made by a subordinate person, on his own responsibility, binds the supreme power, by knowledge and silence on their part. Here we must first distinguish whether the convention is made simply, or under condition of being ratified by the supreme power. For if so, this condition, not fulfilled, (for conditions must be expressly fulfilled,) nullifies the convention; which applies to the convention of Lutatius with the Carthaginians; to which was to be added, that the people, because that convention was made without its authority, denied that it was bound thereby: and therefore another treaty was made on a fresh footing

erat, teneri negaverat: itaque publico consilio aliud de integro fedus factum erat.

2 Videndum deinde, an præter silentium res aliqua accesserit: nam sine re aut facto aliquo silentium non satis probabilem voluntatis conjecturam suppeditat, ut ex his, quæ de dominii derelictione supra diximus, intelligi potest. Sed si actus aliqui accesserint, qui ad aliam causam probabiliter referri nequeant, tum recte intelligitur actus ratus esse habitus: modo probatum id quod cum Gaditanis convenerat, notat Cicero pro Balbo. Cap. 15. *et seqq.*

3 Silentium adversus Carthaginienses urgebant Romani, de pactione cum Asdrubale facta. Sed cum illa pactio verbis concepta esset negantibus, ne Pœni amnem Iberum transirent, vix erat ut silentium solum ad inducendam ratihabitionem facti alieni valeret, quippe cum factum proprium nullum secutum esset, nisi aliquando Pœnus Iberum transire volens prohibitus a Romanis esset, eorumque dicto Pœni paruissent: talis enim actus vim habet actus positivi, nec manet intra Polyb. et Liv. *dict. loc.*

id, de quo Auctor noster loquitur. Vide pag. 597. Excerptorum illorum, ab H. Valesio editorum. *J. B.*]

[f] *Brutulum Papium*] Dion excerpto legationum IV.

by the public authority.

2 We must next see whether, besides silence, any other circumstance has been added. For silence, without some thing or act, does not supply a sufficiently probable conjecture of the will; as may be understood by what we have said above, of the dereliction of ownership. But if any act have been added which cannot be probably referred to another cause, then the act of convention is rightly understood to be accepted as valid. And so the convention with the Gaditani was proved valid, as Cicero notes.

3 The Romans urged silence against the Carthaginians in reference to the convention made with Asdrubal. But since that convention was conceived in negative expressions—that the Carthaginians should not pass the Ebro—it was scarcely a case in which silence alone could establish a ratification of the act of another: since no act of theirs had followed, except it might be that some Carthaginians, wishing to pass the Ebro, had been prevented by the Romans, and the Carthaginians had acquiesced: for such an act has the force of a positive act, and is not merely negative. But if the pact of Lutatius had had more parts, and it appeared that the other parts, though dissenting from common rule, had been observed by the Romans, then there would be a sufficient proof of the confirmation of the convention.

fines nude abnutivos. Quod si Lutatii pactio plures habuisset partes, et ceteras partes a jure communi abeuntes observatas a Romanis semper appareret, jam satis firma esset conjectura probatæ pactionis.

4 Restabat hic dicere aliquid de pactionibus, quas duces et milites non de eo quod summi est imperii, sed de re privata sua aut sibi permissa faciunt: sed de his agendi opportunior erit locus ubi ad ea quæ in bello accidunt perventum erit.

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4 It remained to treat of the conventions which generals and commanders of armies make, not concerning political matters, but their own proceedings and business: but we shall have a better opportunity of discussing this in treating of the rules of War.

CAPUT XVI.

DE INTERPRETATIONE.

I. *Quomodo promissa obligent exterius.*

II. *Verba, si aliæ conjecturæ absint, intelligenda ex proprietate populari.*

III. *Verba artis ex arte.*

IV. *Conjecturis usum esse ex ambiguitate vocum, ex specie repugnantiæ, aut quia sponte se ingerunt:*

V. *Ut ex materia:*

VI. *Ex effectu:*

VII. *Ex conjunctis: origine, aut etiam loco:*

VIII. *Quo pertinet conjectura ex ratione movente, quæ quando et quomodo locum habeat.*

IX. *Distinctio significationum in laxas et strictas.*

X. *Distinctio promissorum in favorabilia, odiosa, mixta, aut media.*

XI. *Rejecta circa actus populorum aut regum differentia contractuum bonæ fidei, aut stricti juris.*

XII. *Ex dictis distinctionibus significationum et promissorum regulæ formantur circa interpretationes.*

XIII. *An sociorum nomine futuri veniant, et quatenus: ubi de fœdere Romanorum cum Asdrubale, et similibus controversiis.*

XIV. *Quomodo interpretandum, Ne alter populus alterius injussu bellum gerat.*

XV. *De illis verbis, Liberam fore Carthaginem.*

XVI. *Quæ pacta personalia habenda, quæ realia, distinctionibus explicatur.*

XVII. *Fedus cum Rege initum extendi ad Regem regno pulsum:*

XVIII. *Non ad regni invasorem.*

XIX. *Promissum ei qui primus hoc fecerit, si plures simul fecerint, cui debeatur.*

XX. *Conjectura se ultro offerens: aut extendit, et quando id fiat:*

XXI. *Ubi et de mandato per aliud implendo:*

XXII. *Aut restringit: idque vel ex defectu originario voluntatis, qui colligitur ex absurdo:*

XXIII. *Ex cessatione rationis unicæ:*

XXIV. *Ex materiæ defectu:*

XXV. *(Observatio circa conjecturas proxime dictas:)*

XXVI. *Vel ex casus emergentis repugnantia cum voluntate: qui sumitur ex illicito:*

XXVII. *Ex onere nimium gravi, habita ratione actus:*

XXVIII. *Ex signis aliis, ut ubi partes scripti inter se committuntur:*

XXIX. *Quæ tum regulæ observandæ sint.*

XXX. *Scripturam in dubio ad contractus validitatem non requiri.*

XXXI. *Regum contractus interpretationem ex jure Romano non sumere.*

XXXII. *Verba conditionem acceptantis, an offerentis, magis spectanda, per distinctionem explicatur.*

I. 1 IPSUM qui promisit solum si spectamus, sponte id præstare obligatur in quod obligari voluit. *In fide*
De Offic. i. 13. *quid senseris non quid dixeris cogitandum*, inquit Cicero. Sed quia interni actus per se spectabiles non sunt, et certi aliquid statuendum est, ne nulla sit obligatio, si quisque sensum quem vellet sibi affingendo liberare se posset; ipsa dictante naturali ratione jus est ei, cui quid promissum est, promissorem cogere ad id quod recta interpretatio suggerit: nam alioqui res exitum non reperiret: quod in moralibus pro impossibili habetur. Hoc forte sensu cum de pactis egisset
p. 376 D. Isocrates præscriptione adversus Callimachum, *τούτῳ*, inquit, *νόμῳ κοινῷ πάντες ἄνθρωποι διατελοῦμεν χρώμενοι*, ut recte cum locum emendavit vir eminentissimæ eruditionis Petrus Faber, [1]*hac lege communi homines inter nos perpetuo utimur*, nec Græci tantum, sed et Barbari, ut paulo ante idem dixerat.

2 Huc illud pertinet in antiqua federum formula apud
Lib. i. 24. Livium: *Sine dolo malo* [a]*utique ea hic hodie rectissime in-*

[1] In toto isto Capite perpetuo conferendus PUFENDORF. *De Jure Nat. et Gent.* Lib. v. cap. 12. cum Notis nostris. *J. B.*

[a] *Utique ea hic hodie rectissime intellecta sunt*] Vota interpretanda, ut communiter sumuntur, notant Hebræi ad Num. xxx.

[2] In Opere Semestrium, Lib. I. cap. 7. in fine. *J. B.*

[b] *Non grammatica quæ est ex origine*] Bene Procopius *Vandalicorum* I. ubi de voce agit Federatorum: *τοῦ χρόνου τὰς προσηγορίας, ἐφ' ὧν τέθεινται, ἥκιστα ἀξιοῦντος τηρεῖν. ἀλλὰ τῶν πραγμάτων ἀεὶ περιφερομένων ᾗ ταῦτα ἄγειν ἐθέλουσιν ἄνθρωποι, τῶν πρόσθεν ὠνομασμένων ὀλιγωροῦντες· Longa dies non solet servare voces in quibus primum datæ sunt sensu: vertun-*

CHAPTER XVI. *Of Interpretation.*

I. 1 If we merely consider him who has promised, he is bound to perform, without compulsion, that to which he was willing to be bound. *In good faith, what you thought, not what you said, is to be considered*, says Cicero. But because internal acts of themselves are not an object of sense, and some certain rule must be established, in order that obligations may not be frustrated, as they might be, if any one, by pretending any sense of his words which he chose to assign, could free himself; natural reason dictates that what is promised to any one, compels the promiser to that which a right interpretation suggests; for otherwise the matter would have no determinate result; which in moral matters is held to be impossible. Perhaps it was in this sense that Isocrates, treating of pacts, spoke of *the common rule which all observe.* So Livy: *sine dolo malo intellecta.*

2 The measure of right interpretation, is the purpose, as inferred

tellecta sunt. Rectæ interpretationis mensura est collectio mentis ex signis maxime probabilibus. [2]Ea signa sunt duum generum, verba et conjecturæ aliæ: quæ aut seorsim considerantur, aut conjunctim.

II. Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, [b]non grammatica quæ est ex origine, sed populari ex usu,

Quem penes arbitrium est, et jus et norma loquendi. Horat. *Art. Poet.* v. 73.

Stulto ergo perfidiæ effugio usi sunt [c]Locri, cum polliciti se pactis staturos quamdiu terram hanc insisterent et capita humeris gestarent, terram calceamentis injectam, et alliorum capita humeris imposita abjecerunt, quasi eo modo religione se possent exsolvere, quæ historia apud Polybium exstat: ac similis perfidiæ exempla aliquot apud Polyænum, quæ transcribere nihil opus est, quia controversiam non habent. Ejusmodi fraudibus recte dixit Cicero adstringi, non dissolvi perjurium. *De Offic.* iii. 32.

III. [d]In artium autem vocabulis, quæ populus vix capit,

tur enim res ipsæ qua volunt homines, vocabula illa primitus imposita rebus nihil curantes. (Cap. II.)

[c] *Locri*] Polybius, Lib. XII. c. 4. Simile quod Bœoti urbem polliciti reddere, non stantem sed eversam reddidere. Thucyd. v. (cap. 42) et quod Mahumetes Sultanus, Eubœa capta, eum dissecuit cui caput incolume fore promiserat. [Vide J. CUSPINIAN. *de Turcarum orig.* in Mahumete II. pag. 132. *Edit. Lugd. B.* 1654. *J. B.*]

[d] *In artium autem vocabulis*] Augustinus in rhetoricis: *Ut multa nova tam a technicis et mathematicis quam a philosophis cognominantur, accipere debemus non tam pro solito usu consuetudinis, quam pro conditione præcepti.* (Cap. 9. Princip. *Rhetoric.* falso illi Doctori tributorum.)

from the most probable signs. These signs are of two kinds, words, and other conjectures; which are considered either separately or conjointly.

II. If there is no conjecture which points another away, the words are to be understood, not according to grammatical and etymological, but popular propriety, as regulated by usage. That was a foolish evasion therefore of the Locrians, who, when they had sworn that they would keep their compact as long as they stood upon the earth and carried heads on their shoulders, put earth in their shoes, and heads of garlick on their shoulders, and then threw them away; as if they could in that way free themselves from their oath: as the story is in Polybius. There are some examples of similar bad faith in Polyænus, which it is not necessary to transcribe, because there is no controversy in such cases. Cicero rightly says, that such artifices do not extenuate, but establish perfidy.

III. In terms of art, however, which are popularly hardly intel-

adhibenda erit artis cujusque prudentum definitio, ut quid sit majestas, quid parricidium, quæ ad finitivum statum referunt oratoriæ artis magistri. Vere enim dictum a Cicerone Academicarum primo: *Dialecticorum verba nulla sunt publica, suis utuntur: et id quidem commune omnium fere est artium.* Sic si in pactis de exercitu dictum fuerit, definiemus exercitum esse eam militum multitudinem, quæ palam fines hosticos ausit invadere: nam passim opponunt historici id quod furtim fit aut latrocinantium more, et quod justo fit exercitu. Quare pro viribus hostium æstimandum, quæ copiæ exercitum faciant. Cicero exercitum vocat sex legiones et auxilia. Polybius Romanum exercitum plerumque ait constitisse sexdecim millibus [3]Romanorum, viginti sociorum: at minor quoque numerus implere potest ejus nominis mensuram. Nam Ulpianus exercitui præesse eum ait, qui vel uni legioni cum auxiliis præest; id est, ut Vegetius exponit, decem millibus peditum, duobus millibus equitum. Et Livius in octo millibus [4]speciem ponit justi exercitus. Pari modo de classe erit æstimandum. Sic [e]arx est locus, qui arcere hostilem exercitum ad tempus possit.

Cap. vii. Parad. vi. L. 2. D. de his qui not. infam. Lib. iii. 1. De Re Milit.

[3] Nimirum peditum. Sed accedebat præterea etiam Equitatus, ut ex sequentibus pater, *Hist.* Lib. III. cap. 72. Vide et Is. Casauboni Notam in Lib. I. cap. 16. pag. 21. *Ed. Amst. J. B.*

[4] Prima Editio sola habet heic in margine, Lib. XXV. Locus est cap. 6. *Speciem justi exercitus fecissemus.* Sed reliquiæ cladis Cannensis, de quibus heic agitur, et quæ Venusiam redierant,

ligible, the definition of the meaning by persons learned in the Art is to be taken: as, what is Treason, what is Parricide; in which writers on Oratory refer to definitions. As Cicero says, *The words of the Dialecticians are not those of common language, but of their own art, and the same is the case in every art.* Thus if in pacts mention be made of an army, we shall define an Army to be a body of soldiers which openly invades an enemy's territory; for historians perpetually put in opposition what is done stealthily in the manner of robbers, and that which is done with a regular army. And therefore what numbers make an army, must be judged according to the force of the enemy. Cicero calls six legions with auxiliaries an army. Polybius says, the Roman army consisted commonly of 16,000 Romans and 20,000 allies: but a smaller number may satisfy the name. For Ulpian says, that he commands an army who commands a single legion with the auxiliaries; that is, as Vegetius explains, 10,000 foot and 2000 horse. And Livy makes the force of a regular army 8000 men. In the same way we must judge of a Fleet. So a Fort is a place strong enough to be held against the enemy for a time.

IV. 1 Conjecturis assumtis opus est, ubi verba aut verborum complexio sunt πολύσημα, id est, *plures significationes recipiunt*. Hunc locum Rhetores vocant ἐξ ἀμφιβολίας· Dialectici subtilius, si in una voce sensus esse plures possent, ὁμωνυμίαν, si in complexione, ἀμφιβολίαν. Similiter conjecturis opus est, quoties in pactis est ἐναντιοφανεία, *species quædam repugnantiæ*. Tunc enim conjecturæ quærendæ sunt, quæ partes alias aliis concilient, si fieri potest: nam si certa sit pugna, quod posterius inter contrahentes placuit, prioribus derogabit: quia uno tempore nemo contraria potuit voluisse; et ea natura est actuum qui a voluntate pendent, ut novo actu voluntatis discedi inde possit, sive μονομερῶς *ex parte una*, ut in lege et testamento, sive conjunctim, ut in contractibus et pactis. Hunc locum Rhetores vocant ἐξ ἀντινομίας. Et his quidem casibus verborum evidens obscuritas cogit recurrere ad conjecturas.

2 Interdum vero ipsæ conjecturæ ita evidentes sunt, ut sponte se ingerant, etiam contra receptiorem verborum significatum. Hunc locum Græci Rhetores vocant περὶ ῥητοῦ

erant tantum quatuor millia hominum, ut narravit supra *Historicus*, Lib. XXII. cap. 54. init. *J. B.*

[c] *Arx est locus, qui arcere hostilem exercitum ad tempus possit*] Servius ad 1 *Æneidos*: *Arces dictæ ab eo quod est arceo, quod inde hostes arcentur, hoc est prohibentur*. (Ad vers. 20.)

IV. 1 It is necessary to have recourse to conjectures, when the words or the connexion of the words is ambiguous, admitting of numerous significations, which the Rhetoricians call an *Amphiboly**. The Dialecticians, more subtly, distinguish *Homonymy*, in which these several senses are in one word, from *Amphiboly*, in which they are in a connexion of words. The like conjectures are necessary when there is in pacts an *Enantiophany*, an appearance of contradiction. For the conjectures are to be sought which may reconcile one part with another, if it may be done. For if the contradiction be real, the latter agreement of the contracting parties must supersede the former: because nobody can will two opposite things at the same time: and the nature of acts which depends on the will is, that by a new act of the will they may be changed, either in one part only, as in a law, and a testament, or in several parts at the same time, as in contracts and pacts. Here they speak of *Antinomies**. In these cases, then, the evident obscurity of the word compels us to recur to conjectures.

2 Sometimes the conjectures are so evident, that they spontaneously suggest themselves, even contrary to the more received

* Ad Herenn. I. 11, and 12; Quintil. VII. 7 and 9.

καὶ διανοίας· Latini *ex scripto et sententia scripti.* Loci autem, ex quibus voluntatis conjecturæ promuntur, præcipui sunt ex materia, ex effectu, ex conjunctis.

Everh. *in loc. a subj. mater.*

L. 15. § 4. *D. loc. cond.*

V. [f]Ex materia, ut vox diei, si triginta dierum pactæ sint induciæ, non debet de diebus naturalibus, sed civilibus intelligi: id enim materiæ congruit. Ita verbum donare sumitur pro transigere ex negotii qualitate. Sic armorum vox, quæ modo belli instrumenta, modo milites armatos significat, pro materia aut hunc aut illum in modum erit interpretanda. Ita homines qui reddere promisit, vivos non mortuos reddere debet, contra quam cavillati sunt Platæenses. Et ferrum deponere jussi, satisfecerunt si gladium deponant, non et fibulas, [5]quod Pericles argutabatur: et exitus ex urbe liber intelligi debet, ita ut et iter tutum sit, contra quam fecit Alexander. Et pars dimidia navium in divisione, integrarum intelligi debet, non sectarum, contra quam [6]Romani Antiocho fecerunt. De similibus idem esto judicium.

Everh. *in loc. ab absurd.*

VI. Ex effectu, in quo præcipuum est si vox ex usu re-

[f] *Ex materia*] Tertullianus *de Pudicitia: ex materia dicti dirigendus est sermo.* Idem habet libro *de Resurrectione Carnis.* [In hoc opere leguntur verba ab Auctore adlata, nisi quod pro voce *sensus* male scripserit *Sermo* cap. 37. In libro autem *de Pudicitia,* cap. 8. *et seqq.* ex hac regula nonnulla loca Scripturæ interpretari conatur Tertullianus; verba autem ipsa regulæ non reperio. *J. B.*]

[5] Refert id Frontinus, *Strategem.* Lib. iv. cap. 7. num. 17. *J. B.*

[6] Narrat illud Valerius Maxim.

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signification of words. This is the received distinction of What is said, and what is meant. The topics, from which conjectures of the meaning are collected, are principally, the Matter, the Effect, and the conjoined Circumstances.

V. From the Matter; as if a truce of 30 days is made, the word *Day* is to be understood, not of natural days but of civil days; for that agrees with the matter: so the word *donare,* for giving up one's rights: so the word *arms,* which sometimes means the instruments of war, sometimes armed soldiers, must, according to the matter, be interpreted one way or the other: so he who promises to give up men, must give them up alive, not dead, as the Platæans quibbled. So when persons are to lay down their steel, this is to be satisfied by laying down their swords, not their steel buckles, as Pericles ingeniously suggested; and when men are to be allowed to depart from a city, they are to do so freely and in safety, contrary to Alexander's proceeding: so the half of the ships, is half the number of whole ships, not each ship cut in halves: as the Romans did to Antiochus. And the like cases must be judged in the same manner.

ceptiore sumta effectum post se traheret a ratione alienum. In ambigua enim voce ea potius accipienda est interpretatio, quæ vitio caret. Itaque non admittenda [7] Brasidæ cavillatio, qui pollicitus agro Bœoto se decessurum, negabat agrum Bœotum esse quem exercitu insideret, quasi de bellica possessione non de finibus antiquis ea vox intelligenda esset: quo sensu inanis fuerat pactio. *L. In Ambig. D. de Leg.* Thuc. iv. 98.

VII. [g] Conjuncta sunt aut origine, aut etiam loco. Conjuncta origine sunt, quæ ex eadem voluntate proficiscuntur, etiamsi alio loco et occasione dicta, unde conjectura nascitur, quia in dubio voluntas creditur sibi fuisse consentiens. Sic apud Homerum quod dictum erat inter Paridem et Menelaum ut victori Helena cederet, ex posterioribus ita erit exponendum, ut victor is demum intelligatur qui alterum occiderit. Rationem reddit Plutarchus: *οἱ δικασταὶ τῷ μηδὲν ἀμφισβητήσιμον ἔχοντι προστίθενται, τὸ ἀσαφέστερον ἐάσαντες· judices accedunt ei quod minus ambiguum est, omisso eo quod est obscurius.* Everh. *in loc. a conj. Duar. Leg.* *Iliad.* iii. 92, 93. *Ibid.* v. 281, 309. Plut. *Symp.* ix. 13.

Lib. VII. cap. 3. § 4. Verum aliter LIVIUS, XXXVIII. 39. *J. B.*

[7] Non Brasidæ, Ducis Lacedæmoniorum, sed Præconis ab Atheniensibus missi. Inspice locum Thucydidis, in ora libri distinctius designatum. *J. B.*

[g] *Conjuncta sunt aut origine, aut etiam loco*] Bene Augustinus contra Adimantum, c. 14. *Particulas quasdam de scripturis eligunt quibus decipiant imperitos, non connectentes quæ supra et infra scripta sunt, ex quibus voluntas et intentio scriptoris possit intelligi.* (§ 2. cap. xiv. *Edit. Benedictin.*)

VI. From the Effect; in which the main case is, when a word taken from ordinary use draws with it an absurd effect. For if the word be ambiguous, the interpretation is rather to be taken which involves no absurdity. Hence the quibble of Brasidas was not to be admitted, who, having promised that he would depart from the Bœotian territory, denied that that was Bœotian territory which he occupied with his army; as if the term were to be understood of warlike possessions, not of the ancient boundaries; in which sense the compact was unmeaning.

VII. Things are conjoined in their origin, or in place. Those are conjoined in their origin which proceed from the same will, although uttered at a different place and time; whence a conjecture is drawn, because in doubtful cases the will is supposed to be in agreement with itself. Thus in Homer, the agreement between Paris and Menelaus, that Helena should be given to the victor, must, from what follows, be so expounded, that he is victor who kills the other. Plutarch gives the reason, that judges take the view which is least ambiguous.

VIII. Inter ea quæ et loco conjuncta sunt, vim præcipuam habet [h]ratio legis, quam cum mente multi confundunt, cum unum sit ex indiciis quibus mentem venamur. Est tamen inter conjecturas hæc validissima, si certo constet aliqua ratione tanquam causa unica voluntatem fuisse motam; nam sæpe rationes sunt plures: interdum et præter rationem voluntas semet ex vi libertatis suæ determinat, quod ad obligationem producendam sufficit. Hoc modo [8]donatio ob nuptias facta vim non habebit, si nuptiæ secutæ non sint.

IX. Cæterum sciendum est, voces multas habere significationes plures, alteram strictiorem, alteram laxiorem: quod multis ex causis evenit, aut quia specierum uni nomen generis adhæret, ut in vocibus cognationis et adoptionis, item in nominibus masculinis, quæ etiam pro communibus sumi solent ubi desunt communia; aut quia usus artis latius patet quam usus popularis, ut [i]mors in jure civili ad deportationem producitur, cum apud populum aliud significet.

[h] *Ratio legis*] Cicero pro A. Cæcina: *Non alia est ratio juris in hoc genere duntaxat, utrum me tuus procurator dejecerit, is qui legitime procurator dicitur omnium rerum ejus qui in Italia non sit, absitve reipublicæ causa, quasi quidam pæne dominus, hoc est, alieni juris vicarius: an tuus colonus, aut vicinus, aut cliens, aut libertus, aut quivis, qui illam vim dejectionemve tuo rogatu, aut tuo nomine fecerit.* (Cap. 20.)

[8] Exemplum istud non suo loco positum, quum pertineat ad superiora, *Si certo constet aliqua ratione tamquam caussa unica*, &c. Deinde ibi nihil obscurum, nihil ambiguum: et exceptio

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VIII. Of things conjoined in time, that which has the greatest force, is the reason of the law, which many confound with the intention, though in fact it is one of the indications by which we trace the intention. But among conjectures, this is the strongest, if it appear certainly that the will was moved by any reason as a sole cause; for there are often several reasons; and sometimes the will determines itself by its liberty and without regard to reason, which suffices for producing an obligation. Thus a donation made in contemplation of a marriage has no power if the marriage does not follow.

IX. But it is to be remarked, that many words have several significations, one, stricter, one, laxer; which happens for many causes: either because the name of the genus is appropriated to one species, as in the word *cognation*, which, meaning any relationship, is used for one kind; and *adoption*, which meaning any assumption of a child, is used for one with certain formalities: and so in masculine words which are used as common to both genders, when common words are wanting; or because the usage of art is more wide than

X. Simul notandum est, eorum quæ promittuntur alia esse [9]favorabilia, alia odiosa, alia mixta, aut media. Favorabilia sunt quæ æqualitatem in se habent, et quæ communem spectant utilitatem, quæ quo major est atque latius patet, eo major est promissi favor, ut eorum quæ ad pacem faciunt major quam ad bellum, et belli ob tuitionem suscepti major quam aliis de causis. Odiosa sunt quæ partem alteram tantum, aut plus altera onerant, et quæ pœnam in se continent, et quæ actus faciunt irritos, et quæ de prioribus aliquid immutant. Quod si mixtum sit aliquid, ut mutans quidem priora, sed pacis causa, id pro magnitudine boni aut mutationis modo favorabile, modo odiosum censebitur, ita tamen ut, ceteris paribus, favor censeatur potior. *Alc. v. Resp. 17.*

XI. Discrimen actuum bonæ fidei et stricti juris, [1]quatenus ex jure est Romano, ad jus gentium non pertinet. Potest tamen aliquo sensu huc aptari, ut scilicet si quibus in regionibus actus aliqui formam quandam habeant communem, ea *Gl. in l. non poss. D. de Leg.*

manifesto sequitur ex natura ipsius rei. *J. B.*

[1] *Mors in jure civili ad deportationem producitur*] Vide Guicciardinum, libro XVI. ubi de pactis Caroli V. ad Mediolanensem ducatum pertinentibus sermo. (Pag. 341. *Ed. Genevens.* 1645.)

[9] Distinctionem illam nec satis certo fundamento niti, et parum utilem esse, ostendimus, post alios, in Notis nostris ad PUFENDORF. *De Jure Nat. et Gent.* § 12. et seqq. Capitis huic respondentis, et antea indicati. *J. B.*

[1] Vide eumdem PUFENDORFIUM, Lib. V. cap. 2. § 8. *J. B.*

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popular usage; as death, in Civil Law, includes civil death, transportation for life, though it does not mean this in popular language.

X. It is also to be observed, that of the things which are promised, some are promises of favour, others of *odium*, others mixed, others medium. Those are of favour, which are equal to both parties, and regard the common utility. In proportion as this is greater and more extensive, the greater is the favour included in the promise; as greater, thus, in things which make for peace than for war; and greater for defensive than for other war. Those are promises of odium which lay a burthen on one party only, or on one more than another, and which impose penalties, and nullify acts, and change former promises. If any thing be mixed, as for instance, what changes former agreements, but for the sake of peace, that must be held favourable or odious as the one or the other may predominate, leaning to favourable, *cæteris paribus*.

XI. The distinction of acts *bonæ fidei* and *stricti juris*, so far as it flows from the Roman Law, does not pertain to the *Jus Gentium*. Yet in a certain sense it may be adapted here: so far as this for

quatenus immutata non est, actui inesse intelligatur: in aliis autem actibus, qui per se sunt indefiniti, qualis est donatio, et liberalis promissio, magis stetur dictis.

XII. 1 His positis hæ tenendæ sunt regulæ. In non odiosis sumenda verba secundum totam proprietatem usus popularis, et si plures sint, eam quæ latissima est; quale est ut masculinum sumatur pro genere communi, et indefinita locutio pro universali. Sic verba hæc, *Unde quis dejectus est,* etiam ad eum restituendum pertinebunt qui vi vetitus est ad suum accedere; nam vox laxius sumta fert eam significationem, ut recte Cicero pro A. Cæcina disputat.

Bart. *in l. Si is qui pro Emt. D. de Usuc.* Covar. iii. *Var.* c. 5. n. 5. Tiraq. *in leg. connub. Gl.* 5. n. 115.

2 In favorabilioribus, si is qui loquitur jus intelligat, aut peritorum juris consilio utatur, verba laxius sumenda, ut etiam includant significationem artis, aut quam lex dedit. [k] Ad significationes autem plane improprias non recurrendum, nisi alioqui absurdum aliquid, aut pacti inutilitas sequeretur. Ex contrario verba etiam strictius quam fert proprietas sumenda erunt, si id necessarium erit ad vitandam iniquitatem vel absurditatem: at si non talis est necessitas, sed manifesta æquitas vel utilitas in restrictione, subsistendum erit intra

[k] *Ad significationes autem plane improprias non recurrendum, nisi alioqui absurdum aliquid, aut pacti inutilitas sequeretur*] Vide exemplum in l. cum

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instance, that if in any place certain acts have a certain common form, that, so far as it is not changed, is understood to be inherent in the act: in other acts, more indefinite in kind, such as donative, and promise made of mere liberality, we must stand more by the words.

XII. 1 This being understood, the following rules are to be observed: In *non-odious* promises, the words are to be taken according to the general propriety of popular usage, and if such usage is manifold, according to that which is widest; as that the masculine gender goes for the common gender, and an indefinite for an universal locution. So the words [in the form of the Interdict for recovering possession] *Unde quis dejectus est,* will apply to restore him who was not ejected, but forbidden to return to his property, as Cicero rightly argued.

2 In *favourable* promises, if he who speaks understands the law, or if he have had the advice of persons skilled in the law, the words are to be taken more laxly, so that they may include a technical or a legal signification. But we must not recur to significations plainly improper, except otherwise some absurdity or the inutility of the pact would follow. On the other hand, words are to be taken more strictly

arctissimos terminos proprietatis, nisi circumstantiæ aliud suadeant.

3 In odiosis vero etiam sermo figuratus aliquantulum admittitur, quo onus vitetur. Itaque in donatione et juris sui remissione verba, quantumvis generalia, restringi solent ad ea, de quibus verisimiliter est cogitatum. Et in hoc rerum genere occupatum nonnunquam id demum intelligetur, quod spes sit posse retineri. Sic auxilia promissa ab una tantum parte intelligentur deberi impendiis ejus qui postulabit. Barb. iv. cons. 92.

XIII. 1 Illustris est quæstio, sociorum nomine veniant tantum qui erant federis tempore, an et futuri, ut in federe facto inter populum Romanum et Carthaginiensem post bellum de Sicilia: *Utriusque populi socii ab utroque populo tuti sunto.* Hinc Romani inferebant, etiamsi fedus cum Asdrubale ictum de Ibero amne non transeundo, nihil ipsis prodesset, quod Carthaginienses id ratum non habuissent, tamen si Carthaginienses factum Annibalis oppugnantis Saguntinos, quos post fedus Romani socios adsciverant, probarent, bellum indici ipsis posse tanquam federe violato. Rationes ita Livius exponit: *Satis cautum erat Saguntinis, sociis utrorumque exceptis: nam neque additum erat iis qui tunc essent,* [1] *nec,* Lib. xxi. 19.

virum, 16. C. *de Fideicommissis.*

[1] *Nec, ne qui postea assumerentur*] Quod additum in pace Peloponnesiaca inter Lacedæmonios et Athenienses. Thuc. Lib. v. c. 18.

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even than propriety requires, if that be necessary to avoid injustice or absurdity; but if the necessity be not such, but a manifest justice and utility in the restriction, we must confine ourselves within the narrowest boundaries of propriety, except circumstances counsel another course.

3 In *odious* promises, figurative language is in some small measure admitted, to avoid the odium. Therefore in a donation and grant of any right, words, however general, are usually restricted to that which was probably thought of. And in this class, that is sometimes spoken of as occupied, which there is hope of retaining. Thus auxiliaries promised on one side only, are understood to be at the expense of him who asks for them.

XIII. 1 It is a noted question, whether under the title of Allies, those are included only who were so at the time of the league being made, or those who became so afterwards; as in the league between the Romans and Carthaginians after the war about Sicily: *The allies of each People shall be unharmed by each People.* Hence the Romans inferred, that though the league struck with Asdrubal, that

ne qui postea assumerentur: et cum assumere novos liceret socios, quis æquum censeret, aut ob nulla quenquam merita in amicitiam recipi, aut receptos in fidem non defendi, tantum ne Carthaginiensium socii aut sollicitarentur ad defectionem, aut sua sponte desciscentes reciperentur? Quæ ferme ad verbum de Polybio sumta apparet. Quid dicemus? Quin verbum sociorum et strictam illam de iis qui erant federis tempore, et ampliorem alteram significationem quæ ad futuros quoque porrigitur, recipere possit salva ratione recti sermonis, dubitandum non est. Utra ergo præferenda sit interpretatio, ex regulis ante traditis erit videndum: secundum quas dicimus, [2]futuros non comprehendi, quia agitur de federe rumpendo, quæ odiosa est materia: et de adimenda Carthaginiensibus libertate, eos qui injuriam ipsis fecisse crederentur armis cogendi; [m]quæ libertas est naturalis, nec temere abdicata censetur.

Hist. iii. 29.

2 Ergo Romanis adsciscere in societatem Saguntinos, aut

[2] Comprehenduntur etiam *futuri*, ut ostendimus in Notis nostris Gallicis ad hunc locum. *J. B.*

[m] *Quæ libertas est naturalis, nec temere abdicata censetur*] Romani Samnitibus Sidicinos bello petere volentibus, petentibusque ut id per Romanos fieri liceret, responderunt, *nihil intercedi, quo minus Samniti populo pacis bellique liberum arbitrium sit.* Livius, Lib. VIII. c. 2. In Antiochi federe est: *Si qui sociorum populi Romani ultro bellum inferrent Antiocho, vim ei arcendi jus esto: cum ne quam urbem aut belli jure teneat, aut in amicitiam accipiat.* Livius XXXVIII. c. 38. Polybius in excerptis legationum 35. [Sidicini nequaquam socii erant Romanorum, ut patet

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he should not pass the Ebro, was not available to them, because the Carthaginians had not ratified it; yet that if the Carthaginians gave their sanction to the act of Annibal who besieged the Saguntines, who had become allies of the Romans after the treaty, war might be declared against them as having violated the treaty. Livy gives the reasons, which are taken almost word for word from Polybius.

How shall we pronounce on this point? That the word *allies* may mean, in a reasonable usage, both those who were so at the time of making the treaty, and a larger signification including future allies, is indubitable. Which interpretation is to be preferred, we must consider, on the preceding principles: and according to them, we say that it does not comprehend future allies, because it treats of breaking the league, which is a matter of odium, and of taking away the liberty of the Carthaginians, to punish with arms those who had wronged them; which is a natural liberty, not likely to be supposed abdicated.

2 Was it then not lawful for the Romans to take the Saguntines

adscitos defendere non licuit? Imo vero licuit, non ex vi federis, sed ex jure naturali, quod federe non erat abdicatum: ita ut Saguntini apud utrosque eo essent loco, quasi nihil de sociis convenisset: quo casu nec Carthaginienses contra fedus erant facturi, si in Saguntinos arma moverent quæ justa arbitrarentur, nec Romani si eos defenderent. Plane sicut Pyrrhi tempore inter Carthaginienses et Romanos convenerat, ut si eorum populorum alter cum Pyrrho fedus faceret, Polyb. *Hist.* iii. 25. ita faceret ut jus auxilia mittendi ei, quem Pyrrhus bello impeteret, salvum maneret. Non dico justum utrinque bellum esse potuisse; sed [n]nego pertinuisse hoc ad federis violationem: quomodo in quæstione de auxilio Mamertinis misso a Romanis distinguit Polybius, an justum id fuerit, et an per Lib. iii. 26. fedus licuerit.

3 Et hoc ipsum est, quod Corcyrenses apud Thucydidem dicunt Atheniensibus, licere ipsis sibi auxilia mittere, nec Lib. i. 35. obstare quod Athenienses habebant cum Lacedæmoniis fedus,

ex fine cap. I. præcedentis apud Livium. In fœdere autem cum Antiocho agitur tantum de jure defensionis, quod in omni pacto tacite exceptum censeri debet. *J. B.*]

[n] *Nego pertinuisse hoc ad federis violationem*] Procopius *Persicorum* II. *ἔφασκέ τε ὡς αὐτὸς οὐ λύει τὰς Περσῶν τε καὶ Ῥωμαίων σπονδὰς, ἐπεὶ αὐτὸν εἰς ταύτας οὐδέτεροι ἐσεγράψαντο· dicebat Alamundarus rex Saracenorum, non violari a se quæ inter Persas Romanosque convenerant, quandoquidem ipse a neutra parte conventis inscriptus esset.* (Cap. 1.)

into alliance, or when allied, to defend them? Certainly this was lawful, not in virtue of the league, but in virtue of Natural Law, which they had not abdicated by the treaty: so that the Saguntines should be in the same situation as if no convention had been made about allies: in which case the Carthaginians would not be acting against the league, if they made what they conceived to be a just war against the Saguntines; nor the Romans, if they defended them: just as at the time of Pyrrhus, an agreement was made between the Carthaginians and Romans, that if either of those Peoples made a league with Pyrrhus, it should be lawful for the other to do so likewise. I do not say the war could have been just on both sides; but I deny that this point had to do with the violation of the league: as in the question concerning the Mamertines, Polybius distinguishes the points, whether it was just, and whether it was consistent with the league.

3 And this is exactly what the Corcyreans in Thucydides say to the Athenians, that it is lawful for them to send aid to them, and that it is not an objection, that the Athenians had a league with the Lacedæmonians, since by that league it was lawful to acquire new allies:

quando per id fedus novos socios adsciscere liceret. Atque eam sententiam secuti sunt Athenienses postea, imperato suis, Lib. i. 45. ne in Corinthios pugnarent, nisi ubi ii descendere pararent hostiliter in Corcyram, aut in aliquod solum ditionis Corcyrensium, ne scilicet fedus rumperent. Non pugnat autem cum federe, ut quos alii offenderent, hi defenderentur ab Lib. iii. 7. aliis, [o]manente de cætero pace. Justinus de his temporibus agens: *Inducias, quas proprio nomine condixerant, ex sociorum persona rumpebant, quippe quasi minus perjurii contraherent, si ferentes sociis auxilia potius quam si aperto* p. 33 A. *prœlio dimicassent.* Sic et in oratione de Haloneso, quæ inter Demosthenicas legitur, apparet pace quadam Atheniensium cum Philippo cautum, ut quæ ea pace non comprehenderentur Græciæ civitates liberæ essent: si quis vim inferret, defendere eas in pace comprehensis liceret. Et hoc quidem exemplum est in federe æquali.

XIV. In federe inæquali ponemus alterum, si convenerit ne alter federatorum injussu alterius bellum gerere possit; quod positum fuisse in federe Romanorum et Carthaginiensium

[o] *Manente de cætero pace*] Sic post tempora memorata Corcyrenses decrevere, Ἀθηναίοις μὲν ξύμμαχοι εἶναι μετὰ τὰ ξυγκείμενα, Πελοποννησίοις δὲ φίλοι· *Velle se Atheniensibus ex pactis societatem armorum præstare, et cum Peloponnesiis servare amicitiæ jura.* [THUCYD. III. 70.]

[3] Immo quia sui ipsius defensio est jus a natura concessum, quo nemo potest ullo pacto sese exuere. *J. B.*

[p] *Liberam fore Carthaginem*] Dio-

And this opinion the Athenians themselves afterwards followed; for they gave command to their officers that they should not fight against the Corinthians, except they attacked Corcyra, or invaded its soil, in order not to break the league. For it is not at variance with a league, that they who are attacked by one party should be defended by the other, peace remaining as to other matters. Justin says, of these events, that *The treaty which they had made in their own name, they broke in the person of their allies, &c.* So in the Oration on Halonesus, it appears that, by the peace between the Athenians and Philip, it was provided that the cities of Greece, not comprehended in that treaty, should be free; and if any one attacked them, those comprehended in the peace might defend them. And this is an example in an equal league.

XIV. In an unequal league we shall suppose other terms: that it is agreed that neither of the allies shall make war without permission of the other: which were the terms of the league of the Romans and Carthaginians, after the second Punic war, as mentioned above:

post bellum Punicum secundum, supra memoravimus; sicut et positum fuit in federe Macedonico cum Romanis, ante Perseum Liv. xlii. 25. regem. Cum belli gerendi nomen, et ad omne bellum pertinere possit, et ad id quod infertur, non quod repellitur, in dubio arctiorem hic significatum sumemus, ne [3]nimium coarctetur libertas.

XV. Ejusdem generis est illud, quod Romani promiserant, [p]liberam fore Carthaginem: quod quanquam ex natura actus de plenissima potestate intelligi non poterat, (belli enim suscipiendi jus et alia quædam pridem amiserant) aliquam tamen illis relinquebat libertatem, et minimum tantum, ut alieno imperio urbem sedibus transferre non tenerentur. Frustra ergo vocem Carthaginis urgebant Romani, dicentes civium multitudinem, [4]non urbem significari: (quod quanquam improprium concedi potest, ob attributum quod civibus magis quam urbi convenit.) Nam in voce, liberam relinqui, *αὐτόνομον*, ut Appianus ait, manifesta erat captio. p. 48.

XVI. 1 Huc et illa frequens quæstio referenda est de pactis personalibus ac realibus. [5]Et siquidem cum populo

dorus Siculus sic refert excerpto legationum 27. mansura illis *νόμους, χώραν, ἱερὰ, τάφους, ἐλευθερίαν· leges, regionem, sacra, sepulchra, libertatem.*

[4] Ubi de Urbe aliqua sermo fit, quamquam ut multitudo Civium spectetur, tamen non sine solo et ædificiis, quæ sedes sunt Populi, intelligitur. *J. B.*

[5] Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. VIII. cap. 9. § 6. *et seqq.* *J. B.*

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as also in the league of the Macedonians and Romans before the reign of Perseus. Since "making war" may include all kinds of war, both offensive and defensive, we must suppose this to be taken in the narrower sense, and to mean offensive war, that the liberty of the parties be not too much restricted.

XV. Of the same nature is that promise of the Romans, that Carthage should be free: which, although, from the nature of the act, it could not be understood of full sovereign power, (for they had already lost the right of making war and other rights,) yet it left some liberty to them, and at least so much, that they should not be compelled to remove the seat of their government by extraneous command. It was in vain, then, that the Romans laid stress on the word *Carthage* [shall be free,] as if it meant the population, not the city; (which, though an improper expression, might be conceded, the attribute *free* belonging to the population rather than the city). For in the word, *free*, *αὐτόνομον*, as Appian says, there was a mere quibble.

XVI. 1 To this is to be referred that frequent question concern-

libero actum sit, dubium non est, quin quod ei promittitur sui natura reale sit, quia subjectum est res permanens. Imo etiamsi status civitatis in regnum mutetur, manebit fedus, quia manet idem corpus, etsi mutato capite, et, ut supra diximus, imperium quod per regem exercetur non desinit imperium esse populi. Excipiendum erit, si appareat causam fuisse propriam ei statui, ut si liberæ civitates libertatis tutandæ causa fedus contrahant.

2 At si cum rege contractum sit, non statim personale erit censendum fedus: nam ut recte dictum est a Pedio et Ulpiano, plerumque persona pacto inseritur, non ut personale pactum fiat, sed ut demonstretur cum quo pactum factum est. Quod si adjectum sit federi ut perpetuum sit, aut factum in bonum regni, aut cum ipso et successoribus: sicut solere adjici in federibus, *καὶ τοῖς ἐκγόνοις, et posteris*, ait Libanius in defensione Demosthenis, aut ad tempus definitum, jam satis apparebit reale esse. Tale videtur fuisse [q] fedus Romanorum

L. Jur. Gent. 7. § Pact. 8. D. de Pact.

q *Fœdus Romanorum cum Philippo Macedonum rege*] Livius Lib. XLII. (c. 25.)

6 Quum distinctio illa sit incerta et lubrica admodum, tutius est statuere, in dubio Fœdera cum Rege inita censenda esse realia, quoniam in dubio Rex intelligitur egisse tamquam Caput Civitatis, et ejus utilitatis caussa. Vide Celeberrimi THOMASII *Jurisprudentiam Divinam*, Lib. III. cap. 25. num. 10. *J. B.*

r Vide Parutam libro V. et VII.

s *Fidenates*] Vide Dionysium Halicarnassensem libro III. (c. 6.)

t *Latini*] De Appulis, [Immo Apiolanis, DION. HALICARN. *Antiq. Rom.* III. 42.] et Latinis, idem eodem libro III. de Turno Herdonio et Latinis, idem libro IV. (c. 46.) Ammianus libro XXVI. *Per-*

ing personal and real pacts. If the transaction be with a free people, it is not doubtful that what is promised is by its nature real, because the subject (the People) is a permanent thing. And even if the state be converted into a kingdom, the league will remain, because the body remains, though the head is changed; and, as we have said, authority exercised by the king does not cease to be the authority of the people. Exception is to be made, if it appears that the cause of the treaty was peculiar to the republican state, as if free cities make a league in defense of their liberty.

2 Even if the compact be made with the king, it is not necessarily personal: for as Pedius and Ulpian say, commonly the person is inserted in the compact, not that it may be a personal compact, but that it may appear on the face of it with whom it was made. And if it be added to the treaty, that it is to be perpetual, that it is made for the good of the kingdom, or with him and his successors, as is commonly added in treaties, or for a definite time, it is plainly real. Such appears to have been the treaty of the Romans with king

cum Philippo Macedonum rege, quod cum Perseus ejus filius ad se pertinere negaret, bellum eo nomine exortum est. Sed et alia verba, et ipsa interdum materia conjecturam suppeditabunt non improbabilem.

3 Quod si pares sint in utrumque conjecturæ, supererit, [c]ut favorabilia credantur esse realia, odiosa vero personalia. Federa pacis causa facta, aut commerciorum, favorabilia sunt. Quæ belli causa, non odiosa omnia, ut quidam censent, sed ἐπιμαχίαι, id est, federa tuendi se causa, propius ad favorem accedunt, ξυμμαχίαι magis ad onera. Ad quæ accedit quod in federe ad bellum quodvis, præsumitur ratio habita [r]prudentiæ et pietatis ejus quicum agitur, ut qui non modo non injuste, sed nec temere bellum suscepturus videretur.

4 Quod vero dici solet, societates morte finiri, huc non adfero: pertinet enim hoc ad societates privatas, et juris est civilis. Jure ergo an injuria [s]Fidenates, [t]Latini, Etrusci, Sabini a federe discesserint mortuis Romulo, Tullo, Anco, Dec. Lib. i. *cons.* 22.

sarum rex manus Armeniis injectabat, eos ad suam ditionem ex integro vocare vi nimia properans, sed injuste; causando quod post Joviani excessum, cum quo fedus firmaverat et pacem, nihil obstare debeat, quo minus ea recuperaret quæ ante ad majores suos pertinuisse monstrabat. (Cap. 4.) Similia de Justiniani pactis cum Saracenis vide apud *Menandrum Protectorem.* (Cap. 12.) Adde quæ Helvetii causantur post mortem Henrici III. apud Thuanum libro XCVII. in anno cIↃ IↃ LXXXIX. Vide et insignem locum apud Camdenum in anno cIↃ IↃ LXXII. ubi de federe antiquo Gallorum cum Scotis.

Philip, which, when Perseus his son refused to acknowledge as pertaining to him, war arose on that ground. But other words also, and the matter itself, sometimes supply probable conjecture on this subject.

3 If there be equal conjectures each way (for a real and a personal pact), the result must be that favourable pacts are to be believed real, odious ones, personal. Treaties of peace or commerce are favourable: those made with a view to war, not all odious, as some think, since *epimachies*, engagements of support in defensive war, are nearer to favour, *symmachies*, engagements to war in general, nearer to burthens. Add to which, that in a treaty looking to any war, it is presumed that account is had of the prudence and piety of the person treated with, as one who will not undertake a war unjustly, nor even rashly.

4 The maxim, that partnerships are separated by death, I do not here adduce: for that belongs to private partnerships, and is a maxim of Civil Law. Whether the Fidenates, Latins, Etruscans, Sabines, were right or wrong in renouncing their league with the Romans

Prisco, Servio, dijudicari a nobis recte non potest, cum non extent federum verba. Cui non dissimilis est illa apud Justinum controversia, an civitates, quæ Medorum tributariæ fuerant, mutato imperio conditionem mutassent. Spectandum enim an in conventione fidem Medorum elegissent. Minime vero admittenda est Bodini argumentatio, federa ad regum successores non transire, quia juramenti vis personam non exeat. [7]Potest quippe juramenti obligatio personam tantum obstringere, et ipsa promissio obligare heredem.

Lib. i. 7.

Lib. v. c. *ult.*

5 Neque enim verum est quod sumit, federa jurejurando veluti firmamento inniti, cum plerumque in ipsa promissione satis sit efficaciæ, cui majoris religionis causa jusjurandum additur. P. Valerio Consule juraverat plebs Romana conventuros se jussu Consulis. Mortuo illi succedit L. Quintius Cincinnatus. Cavillantur Tribuni quidam, quasi non teneretur religione populus. Sequitur Livii judicium: *Nondum hæc quæ hoc tenet sæculum negligentia Deum venerat: nec interpretando sibi quisque jusjurandum et leges aptas faciebant; sed suos potius mores ad ea accommodabant.*

Lib. iii. 20.

XVII. Sane cum rege initum fedus manet, etiamsi Rex

[7] Confer Pufendorfium, *De Jure Nat. et Gent.* Lib. iv. cap. 2. § 17. cum nostris Notis, alterius Editionis. *J. B.*

[u] *Hi possessionem habent, jus non habent*] Sic Valens non accepit excusationem Gotthorum regis, qui Procopio purpuræ invasori auxilia se misisse dicebat: excusationem vanissimam dicit Ammianus libro xxvii. (c. 5.) Apud Græcos scriptores eadem historia, sed sub Scytharum nomine: ita enim Gotthos vocabant. Sic Justinianus negabat

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when Romulus, Tullus, Ancus, Priscus and Servius were dead, we cannot judge, not having the words of the treaties extant. Not unlike this is the controversy in Justin, whether the cities which had been tributaries of the Medes, when the empire was changed, had changed their condition. For the argument of Bodinus is by no means to be accepted, that treaties do not pass to the successors of kings, because the force of an oath does not go beyond the person. For the obligation of the oath may bind the person only, while the obligation of the promise may bind the heir.

5 Nor is it true, as he assumes, that treaties depend entirely upon oaths; for the promise of itself gives force to the treaty, and the oath is added only for the sake of religious reverence. So when the Roman people had sworn that they would make a treaty under direction of the Consul, and Valerius the Consul died, some of the Tribunes held that the people was not bound: but Livy judges otherwise: *As yet*, he says, *men had not become, as now, careless of oaths.*

XVII. If a treaty be made with a king, and he or his successor

idem aut successor regno a subditis sit pulsus. Jus enim regni penes ipsum manet, utcunque possessionem amiserit: quo pertinet Lucani illud de Senatu Romano (Lib. v. vers. 29),

Non unquam perdidit ordo
Mutato sua jura loco.

XVIII. Contra, si alieni regni invasor volente vero rege, aut oppressor populi liberi, antequam sufficiens populi consensus accedat, bello impetatur, nihil eo fiet contra fedus: quia [u]hi possessionem habent, jus non habent. Et hoc est quod Nabidi dicebat T. Quintius: *Amicitia et societas nobis nulla tecum, sed cum Pelope rege Lacedæmoniorum justo ac legitimo facta est.* Qualitates autem istæ in federibus regis, successoris, et similes, jus proprie significant, et odiosa est invasorum causa. Liv. xxxiv. 32.

XIX. Tractaverat olim Chrysippus hanc quæstionem, an præmium promissum ei, qui primus ad metam pervenisset, debeatur utrique si simul pervenerint, an neutri. Et sane [x]vox primi ambigua est, nam aut eum significat qui omnes antecedit, aut quem nemo. Sed quia virtutum præmia favorabilia sunt, [8]verius est concursuros ad præmium, quanquam Apud Plut. *De Stoic. Repug.* p. 1045 D.

fedus se rupturum cum Gizericho factum, si Gelimerem bello impeteret, qui justo regi Ilderiche cum regno libertatem eripuerat. [Apud PROCOPIUM, *Vandalic.* I. 9.] Vide Cardinalem Tuschum, pp. verbo Tyrannus concl. 309, num. 6. Cacheranum decis. LXXIX. num. 35.

[x] *Vox primi ambigua est*] Vide Albericum de Rosato *de Statutis* qu. 106. et 107.

[8] Heic potius mihi videtur distinguendum, an actus, cujus præstationi

be expelled by his subjects, the treaty remains valid: for the right of the kingdom remains with him, though he have lost possession. So Lucan, speaking of the Roman Senate in exile.

XVIII. On the other hand, if an Usurper of the kingdom be attacked by its ally with the consent of the true king; or if the oppressor of a free people be so attacked, before the sufficient consent of the people can be obtained; nothing is done against the treaty: for such persons have possession, but not right. As Quintius said to Nabis, *We made no alliance with you, but with Pelops, the just and legitimate king of the Lacedæmonians.* And these qualities, (just and legitimate,) in treaties, refer to the right of the king and his successors: the cause of Usurpers is an *odious* cause.

XIX. Chrysippus had treated this question, Whether a prize proposed to him who reaches the goal first should, if both arrive there at the same time, be given to both or to neither. And in fact, the word *first* is ambiguous: it means either him who gets before all others, or whom none gets before. But because the prizes of excellence are

liberalius [y] Scipio, Cæsar, Julianus his, qui pariter muros ascenderant, solida præmia tribuerunt. Et hæc quidem dicta sunto de interpretatione ea, quæ verborum significationi propriæ vel impropriæ aptatur.

Everh. in loc. a rat. leg. ad restrict. et in loc. a rat. leg. ad extension.

XX. 1 Est et aliud interpretandi genus, ex conjecturis, extra significationem verborum, eorum scilicet, quibus promissio continetur: idque duplex, vel extendens vel coarctans. Sed quæ extendit interpretatio difficilius procedit, facilius quæ arctat. Nam sicut in rebus omnibus, ut effectus non sequatur, satis est unam deesse causarum, ut nascatur, omnes convenire oportet; ita et in obligatione conjectura extendens obligationem non temere admittenda est: multoque hic difficilius quam in casu, de quo supra dicebamus, ubi verba largam aliquam significationem, etsi minus receptam, admittunt. Nam hic extra verba promittentia conjecturam quærimus, quæ valde certa esse debet, ut obligationem inducat, nec ratio similis sufficit,

præmium promissum est, possit *iterari, aut non.* Si *prius,* jubendi sunt illi, qui præmium ambiunt, iterum e. g. cursum instituere. Si posterius, vel ipsum *præmium* sine incommodo aut onere nimio multiplicari potest, vel *non potest.* Si *potest,* utrique solidum præmium dandum, quum uterque meritus sit. *Sin minus,* præmium vel *dividi* potest, et tunc inter illos æquis partibus dividendum; vel *in commune possideri,* et ita possidebitur; vel neutrum fieri potest, et tunc vel ex *sorte,* vel ex *pacto,* res uni adjudicanda. Quæ omnia fusius deduximus et probavimus in Notis nostris Gallicis. *J. B.*

[y] *Scipio*] Capta Carthagine nova in Hispania. [Refert id Livius, XXVI. 48. Adde Excerpta ex Dione Cassio, pag. 602. inter Exc. Vales. *J. B.*]

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matters of favour; the sounder opinion is, that the two should share the prize: though Scipio, Cæsar, Julian, more liberally gave a full prize to both of those who had mounted the walls at the same time.

And so much of the interpretation which is adapted to the proper or improper signification of words.

XX. 1 There is also another kind of interpretation, from Conjectures, extraneous to the signification of the words in which the promise is made: and this interpretation is twofold, either extending or restricting the meaning. But the interpretation which extends, proceeds more difficultly, that which restricts, more easily. For as in all things, in order that the effect may not follow, it is enough if one of the causes be wanting; and in order that it may take place, it is necessary that all conspire; so in obligation also, a conjecture extending the obligation is not lightly to be admitted; and in this case it is much more difficult than in the case which we spoke of before, to assign to words some large but unusual signification. For here, besides the words of promise, we have to look for some conjecture, which ought

sed oportet eadem sit; nec id semper satis est, ut dicamus ex ratione faciendam extensionem: quia, ut modo dicebamus, sæpe ratio ita movet, ut voluntas tamen sit causa per se sufficiens, etiam sine ratione illa.

2 Ut ergo talis extensio recte fiat, opus est ut constet rationem, sub quam venit casus quem volumus comprehendere, esse causam unicam et efficacem, quæ promittentem moverit, eamque rationem ab eo consideratam in sua generalitate, quia alioqui promissio futura fuisset iniqua aut inutilis. Hæc quoque pars tractari solet a rhetoribus in loco *περὶ ῥητοῦ καὶ διανοίας*, cujus speciem unam ponunt, quoties semper eandem sententiam dicimus: sed et alter locus *κατὰ συλλογισμὸν, per ratiocinationem* huc pertinet: nimirum ubi ex scripto ducimus quod scriptum non est, ut loquitur Quintilianus. Et quæ a jurisconsultis traduntur [z] de his, quæ in fraudem fiunt.

[z] *De his, quæ in fraudem fiunt*] Bene Seneca excerptis controversiarum VI. 3. *Circumscriptio semper crimen sub specie legis involvit: quod apparet in illa, legitimum est: quod latet, insidiosum.* Quintilianus controversia (immo *Declamat.*) CCCXLIII. *Neque enim unquam decurritur ad hanc legem* (nempe de circumscriptione) *nisi cum rectum jus nequitia exclusum est.* Exemplum habes apud Plinium *Historiæ Naturalis* libro XVIII: *Quippe etiam lege Stolonis Licinii incluso modo IↃ jugerum, et ipso sua lege damnato, cum substituta filii persona amplius possideret.* (Cap. 3.) Est eadem historia apud Valerium Maximum VIII. c. vi. 3. Vide aliud exemplum apud Tacitum *Annalium* XV. (Cap. 19) de fictis adoptionibus. Aliud in novella Emanuelis Comneni, quæ est in jure Græco-Romano.

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to be very certain, which may induce an obligation; nor does analogy suffice, we must have identity of reason: nor is it always enough that we can say the words are to be extended for existing reasons: for, as we have said, reason often so operates, that nevertheless, the will may be a sufficient cause, without any reason.

2 Therefore, in order that such an extension may be rightly made, it is necessary that it should be apparent that the reason under which the case comes which we wish to comprehend, should be the sole and efficacious cause which moves the promiser; and that that reason was considered by him in its generality; because otherwise the promise would have been unjust or useless. This is also treated by Rhetoricians in their sections on *What is said and what is meant;* of which one kind which they mention is, when we always utter the same sentence. But also another section, *On reasoning,* belongs to the subject: namely, when from what is written we deduce what is not written, as Quintilian says: and also what is delivered by the Jurists as to what is done fraudulently.

3 Exemplum sit [a]in pactione, ne quis locus muris cingatur, facta eo tempore cum non aliud esset muniendi genus. Is locus ne aggere quidem cingi poterit, si satis constet prohibendi muros unicam fuisse causam ne muniretur is locus. Vulgo solet exemplum adferri de conditione, si posthumus sit mortuus, ab eo scripta qui posthumum omnino exspectabat, ut sententia dispositionis producatur ad eum casum, si is posthumus natus non esset, quia constet voluntatem loquentis motam fuisse consideratione non exstituræ prolis: quod ipsum non apud jurisconsultos tantum, sed et [b]apud Ciceronem, et Valerium [9]Maximum invenire est.

Lib. i. 39. et ii. 32. *de Orat.* *Bruto.* c. 52, 53.

Cap. 20.

4 Cicero causam hanc adfert oratione *pro Cæcina: Quid? verbis satis hoc cautum erat? minime. Quæ res igitur valuit? voluntas: quæ si tacitis nobis intelligi posset, verbis omnino non uteremur: quia non potest, verba reperta sunt, non quæ impedirent, sed quæ indicarent voluntatem.* Mox in eadem oratione dicit idem jus esse, ubi perspicitur [c]una at-

[a] *In pactione, ne quis locus muris cingatur, facta eo tempore cum non aliud esset muniendi genus*] Fuscus Arellius in controversia, quæ est apud Senecam decima libro II. *Hunc enim animum fuisse sine dubio jurantium, ut vi non diducerentur, cum illud quoque caverint, ne morte dividerentur.*

[b] *Apud Ciceronem*] Etiam *de Inventione* II. (c. 42.)

[9] Nihil hac de re exstat apud Valerium Maximum, nec in Capite *De ratis Testamentis et insperatis*, ubi locus esset aptus, nec alibi, quod sciam. Sed in Cap. præced. Lib. VII. cap. 7. n. 1. exemplum legitur, quod ad hanc regulam potest referri, quamquam contrario modo: nimirum Patris, qui, quum Filium suum in bello occubuisse falso crederet, alios instituerat heredes. Hoc, ut videtur, ansam dedit errori Auctoris nostri, memoriæ vitio duo diversa confundentis. *J. B.*

[c] *Una atque eadem causa æquitatis*] Sic in sponsam alterius adulterium committi probat Philo de specialibus legibus, addita causa: *αἱ γὰρ ὁμολογίαι τοῖς γάμοις ἰσοδυναμοῦσι·* (Pag. 788 A.)

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3 Take an example in an agreement made that no place shall be walled round, made at a time when there was no other way of fortification. That place cannot even have an earth-work made round it, if it appear that the only cause for prohibiting walls was that the place might not be fortified. An example is often taken in the conditions introduced in the will of a testator in case his posthumous child die, the testament being made by one who fully expected a posthumous child; and the rule is used to extend the dispositions of the testament to the case in which the posthumous child is not born: because it is evident that the will of the testator was moved by the consideration of a progeny which never came into existence: which example we find not only in the Jurists, but also in Cicero and Valerius Maximus.

4 See Cicero in the oration *pro Cæcina.* And hence the form of

que eadem causa æquitatis, id est, rationis quæ sola moverat: Ita interdictum, *unde tu me vi dejeceris hominibus coactis armatisve*, locum habere adversus omnem vim quæ ad caput et vitam pertineat. *Ea enim*, inquit, *plerumque fit per homines coactos armatosque: quæ si alio consilio, eodem periculo facta sit, eodem jure esse voluerunt.* In declamatione patris Quintiliani exemplum hoc est: *Cædes videtur significare sanguinem et ferrum: si quis alio genere homo fuerit occisus, ad illam legem revertemur. Si inciderit in latrones,* [1] *aut in aquas præcipitatus, si in aliquam immensam altitudinem dejectus fuerit, eadem lege vindicabitur qua ille qui ferro percussus sit.* Similis est argumentatio Isæi oratione de Pyrrhi hereditate, cum ex eo quod testamentum Attica lege vetitum esset fieri filia invita, infert, ne adoptionem [2] quidem ea invita permitti. Cap. 22. Decl. 250.

XXI. Atque hinc solvenda est celebris illa quæstio, quæ et apud Gellium est de mandato, an impleri possit non per Lib. i. 13.

Idem valent sponsalia quod nuptiæ. Sic in lege per Mosem data sub bovis nomine intelliguntur omnia animantia mansueta: sub nomine putei fossa quævis, Exodi xxi. 28. et 35. Chassanæus *Catalogo gloriæ mundi* v. parte, consid. 49.

[1] Editio Obrechti habet: *Si occiderit in latrinas aut* &c. quod omnino rectius est. *J. B.*

[2] Locus est pag. 400. *Edit. Wech.* sed ubi hoc tantum dicitur, Patrem qui solas filias, ex justo matrimonio natas, relinquit, neminem posse adoptare, heredemque scribere, nisi cui prius filiam in matrimonium collocaverit, juxta Legem Athenis constitutam. Deceptus est Auctor ab Interprete Latino infelicissimo, qui ἐπὶ ταύταις vertit, *in illarum* [filiarum] *arbitrio:* et ἄνευ τῶν θυγατέρων, *insciis filiabus, non consultis:* quum hæc significent, non sine illis uxoribus ductis ab eo, qui testamento heres instituitur. Adde Viri Eruditissimi Jac. Perizonii *Dissert. Triad.* Diss. II. pag. 60, *et seqq.* ubi recte locum exponit; ut dudum post hæc scripta animadverti. *J. B.*

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interdict, *Unde tu me vi dejeceris hominibus coactis armatisve*, will hold against all force endangering life, though there may not be a body of armed men. As Cicero says, the legal effect is the same. So Quintilian says, *Murder* seems to imply steel weapons and blood; but if any one is killed in any other way, we still recur to that law: for instance, if the man be thrown from a precipice. So Isæus, because by the Attic Law a testament could not be made [by a father having no son] against the will of a daughter, infers that an adoption could not be made without her consent.

XXI. And on these principles is to be solved that celebrated question which we have in Gellius, about a commission; whether it may be fulfilled, not by the identical thing directed, but by another equally useful or more useful than that which was enjoined by him

idem, sed per aliud æque utile, aut utilius quam erat id quod mandator præscripserat. [3] Id enim ita demum licet, si constet quod præscriptum erat, non præscriptum fuisse sub speciali sua forma, [d] sed sub consideratione generaliore, quæ aliter quoque obtineri possit: quomodo cum qui fide jubere erat jussus, mandare posse creditori, ut tertio pecuniam numeret, a Scævola responsum est. Ceterum ubi de eo non satis constat, retinendum est quod apud Gellium eo loco legitur, dissolvi imperantis officium, siquis ad id, quod facere jussus est, non obsequio debito, sed consilio non desiderato respondeat.

L. ult. D. Mandat.

XXII. Restringens interpretatio extra significationem verborum quæ promissionem continent, aut ex defectu petitur originario voluntatis, aut ex casus emergentis repugnantia cum voluntate. Defectus voluntatis originarius intelligitur ex absurdo, quod alioqui evidenter sequeretur; ex cessatione rationis [e] quæ sola plene et efficaciter movit voluntatem; et ex materiæ defectu. Primum in eo fundamentum habet, quod nemo credendus est velle absurda.

[3] Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. v. cap. 4. § 5. *J. B.*

[d] *Sed sub consideratione generaliore*] Quintilianus *Controvers.* [Immo *Declam.*] CCLVII. *Servi quædam liberius ex bona mente faciunt, et aliquando indicium fidei putant pretio emta mancipia, non paruisse.* Exemplum habes in excerptis legationum in illa parte, quomodo legationes obeundæ accipiendæque

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who gave the commission. For it is lawful to do so, if it be clear that what was prescribed was not prescribed under its special form, but under a more general purpose, which might also be obtained in some other way: thus, he who was ordered to give security for a loan to be made to a third person, might, instead, give an order to the lender to make the payment to the third person; as Scævola held. [*Dig.* XVII. 1.] But when that is not clear, we must hold, as Crassus says, in Gellius in that place, that the demand of the superior is disregarded, if any one, in place of discharging his commission as directed, respond by advice which was never asked for.

XXII. An interpretation restricting a promise, extraneously to the signification of the words which contain the promise, is derived either from original limitation of the will [of the promiser], or from the repugnance with such will which comes to view in some occurring case. A limitation of the original will is understood—from the absurdity which would evidently follow, if it were not so limited;—from the cessation of the reason which alone fully and efficaciously moved the will;—and from the defect of the matter.

The first restriction has its ground in the consideration, that no one is supposed to intend what is absurd.

XXIII. Secundum, ex eo quod contentum in promissione, ubi ratio talis additur, aut de ea constat, non consideratur nude, sed quatenus sub ea ratione venit.

XXIV. Tertium, in eo quod materia de qua agitur semper intelligenda est observari animo loquentis, etiamsi verba latius pateant. Hæc quoque interpretandi ratio a Rhetoribus tractatur in loco περὶ ῥητοῦ καὶ διανοίας, et titulum habet, cum dicitur non semper eadem sententia.

XXV. 1 Sed de ratione notandum est, sub ea comprehendi sæpe quasdam res non secundum existentiam, sed secundum potentiam moraliter consideratam, quæ ubi locum habet, restrictio facienda non est. Sic si cautum sit, ne exercitus aut classis aliquo ducatur, non poterit duci, etiam animo non nocendi. Quia in pactione non certum damnum, sed periculum qualecunque spectatum est.

2 Solet et hoc disputari, an promissa in se habeant tacitam conditionem, si res maneant quo sunt loco: quod negandum est, nisi apertissime pateat statum rerum præsentem in

sint; et in iis quæ Johannes Justinianeorum ducum unus fecit contra Belisarii verba, *Gothicorum* II. et IV. [Scilicet apud PROCOP. Lib. II. c. 10. et *Hist. Misc.* c. 23.]

[c] *Quæ sola plene et efficaciter movit voluntatem*] Exemplum in l. *Adigere* 6. § *quamvis*. 2. D. *de jure patronatus*.

XXIII. The second in this, that what is contained in the promise, when such a reason is added, or the reason is certain, is not considered nakedly, but so far as it comes under that reason.

XXIV. The third in this, that the matter which is dealt with is always supposed to be present to the mind of the speaker (the promiser), although the words have a wider signification. This way of interpretation also is treated by writers on Rhetoric in the Section, *Of what is said and what is meant;* and has for its Title, *When the same words are used, but not in the same sense.*

XXV. 1 But with regard to the reasons [of promisers, as here applied], it is to be noted that there are comprehended therein many things, not as to whether they exist, but as to their power morally considered; and when this holds, the restriction is not to be introduced. Thus if it be stipulated that an army or a fleet is not to be moved into a certain place, it must not be moved thither, though it be done with no purpose of attack. For in the compact, it was not a certain damage, but a danger of any kind which was considered.

2 This also is often disputed, whether promises have in themselves this tacit condition, If things remain in their present state. And this is to be denied, except it be quite clear that the present

Pascal. *leg.* c. 57. unica illa quam diximus ratione inclusum esse. Sic passim in historiis legimus legatos a suscepto itinere domum rediisse deserta legatione, quod res ita mutatas intelligerent, ut tota legationis materia aut causa cessaret.

XXVI. 1 Repugnantia casus emergentis cum voluntate solet et ipsa ab oratoriæ artis magistris referri ad eum, quem dixi locum *περὶ ῥητοῦ καὶ διανοίας*. Est autem duplex: nam aut voluntas colligitur ex naturali ratione, aut ex alio signo voluntatis. Dijudicandæ voluntati ex naturali ratione Aristoteles, qui hanc partem accuratissime tractavit, propriam virtutem tribuit in intellectu *γνώμην*, sive *εὐγνωμοσύνην*, id est, *æquiprudentiam*, in voluntate vero *ἐπιείκειαν*, id est, *æquitatem*, quam sapienter definit, correctionem ejus [f]in quo lex deficit ob universalitatem: quod ad testamenta quoque et pacta suo modo referri debet. Nam quia casus nec prævideri omnes possunt nec exprimi, ideo libertate quadam opus est eximendi casus, quos qui locutus est si adesset eximeret: non tamen temere; id enim esset dominum se facere actus alieni; sed ex sufficientibus indiciis.

[f] *In quo lex deficit ob universalitatem*] Seneca IV. *controversia* 27. *In lege, inquis, nihil excipitur, sed multa quamvis non excipiantur intelliguntur:*

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state of things was included in that sole reason of which we have spoken. Thus we constantly read in history of ambassadors who gave up their commission and returned home, because they understood that the state of things was changed, so that the whole matter or cause of the embassy ceased.

XXVI. 1 The repugnance of an occurring case with the will [of the promiser] is commonly, in writers on oratory, referred to the Section of which I have spoken, *Of what is said and what is meant.* It is twofold: for the will is either collected from natural reasons, or from some other sign of the will. Aristotle, who has most correctly treated this part, ascribes to the intellect a peculiar power for judging of the will, which he calls *γνώμη*, or *εὐγνωμοσύνη*, that is *equitable insight;* and to the will he ascribes a corresponding power, *ἐπιείκεια*, *equity*, which he ably defines, The correction of the law, when it is defective from the universality of its expression*. And this equity is also to be applied to testaments and compacts in an appropriate manner. For since all cases can neither be foreseen nor expressed, there is a necessity for some liberty for excepting cases which he who has spoken would except if he were present. But this is not to be done rashly; (for that would be for the interpreter

* See *E. M.* 401.

2 Certissimum indicium est, si quo casu sequi verba illicitum esset, id est, pugnans cum naturalibus aut divinis præceptis. Talia enim, cum obligationis capacia non sint, eximenda sunt necessario. *Quædam*, ait Quintilianus pater, *etiamsi nulla significatione legis comprehensa sint, natura tamen excipiuntur.* Ita qui promisit depositum gladium reddere, non reddet furenti, ne aut ipsi periculum creet, aut aliis innocentibus. Sic nec reddetur res deposita ei, qui deposuit: si dominus eam repetat. *Probo*, inquit Tryphoninus, *hanc esse justitiam, quæ suum cuique ita tribuit, ut non distrahatur ab ullius personæ justiore repetitione.* Ratio est, quia, ut alibi notavimus, introducti semel dominii ea vis est, ut rem domino cognito non reddere omnino injustum sit.

Decl. 315.

L. bon. fid. 32. *D. depos.*

XXVII. 1 Secundum erit indicium, si verba sequi non quidem per se et omnino illicitum sit, sed æque rem æstimanti nimis grave atque intolerabile: sive absolute spectata conditione humanæ naturæ, sive comparando personam et rem, de qua agitur, cum ipso fine actus. Sic qui rem ad dies aliquot commodavit, intra eos dies repetere eam poterit, si ipse valde

Molin. *disp.* 294. Sylv. *Verb. commod.* n. 4. *Less. l.* 11. c. 27. *dub.* 5.

et scriptum legis angustum est, interpretatio diffusa: quædam vero tam manifesta sunt ut nullam cautionem desiderent.

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to determine the acts of another); but on sufficient indications.

2 The most certain indication is, if in any case to follow the words would be unlawful, that is, at variance with the precepts of Natural or Divine Law. For such cases, since they cannot impose an obligation, must necessarily be excepted. *Some things,* says Quintilian the father, *though they are not comprehended in any terms of the law, are by their nature excepted.* Thus he who has received a sword as a deposit, promising to give it up on demand, is not to give it up to a madman, in order that he may not create danger to himself or to other innocent persons. Tryphoninus says, *I agree that it is justice to give to each his own, but in such a way that it may not be again demanded on a better claim by some other person.* The reason is, because, as we have elsewhere noted, the force of ownership once introduced, is such that not to restore a thing to the owner, when known, is altogether unjust.

XXVII. 1 A second indication of a reason for deviating from the words of the promiser, in our interpretation, is, if to follow the words will be, not indeed quite unlawful, but to a person fairly estimating the matter, grievous and intolerable: either looking absolutely at the condition of human nature, or comparing the person and thing in question with the end of the act. Thus he who has lent a

egeat: quia actus tam benefici ea est natura, ut non credendus sit quisquam ad magnum suum incommodum se voluisse obligare. Sic qui auxilium federato promisit, excusabitur quamdiu ipse domi periclitatur, in quantum copiis opus habet. Et [g] concessio immunitatis vectigalium et tributorum intelligetur de quotidianis et anniversariis, non de iis, quæ summa necessitas exigit, et quibus carere respublica non potest.

Ang *ad l. 7. ad l. Rhod.* Vasq. *contr. Ill.* c. 31.

De Offic. I. 10.

2 Ex quibus apparet nimis laxe dictum a Cicerone, non servanda promissa quæ sint iis quibus promiseris inutilia, nec si plus tibi noceant quam illi prosint cui promiseris. Nam an res utilis sit futura ei, cui promissa est, judicare promissor non debet, nisi forte in casu furoris, de quo supra diximus: et ut promissum promissorem non obliget, non satis est quodlibet nocumentum in promissorem, sed tale oportet sit, [h] quod pro natura actus credi debeat exceptum. Sic qui operas vicino ad dies aliquot promisit, non tenebitur, si eum morbus sonticus

[g] *Concessio immunitatis*] Vide Rosenthalium *de Feudis* cap. v. concl. LXXXVI. num. 2. Heig. *Illustrium* XVIII. num. 16. parte I. Gothmannum cons. XI. 32. Clarum § feudum. XXIX. 2. Andream Knich *de Vestitis Pactis*, parte II. c. 5. num. 20. Henricum Bocer *de Collectis* cap. IV. 12.

[h] *Quod pro natura actus credi debeat exceptum*] Vide Carolum Molinæum *ad Consuetudines Parisienses* tit. I. § 2. gl. IV. n. 3. Ferd. Vasquium *de Successionum Creatione* libro II. § xviii. num. 80. Antonium Fabrum *rerum in Sabaudia judicatarum* libro IV. tit. 30. Zasium in l. stipulatio hoc modo. 61. num. 3. de verborum obligationibus. Adde c. quemadmodum. 25. *de jurejurando* et Alciatum ad c. *cum contingat*, eodem titulo.

[i] *Quod apud Senecam legimus*] Ejusdem hæc sunt, capite xxxix. Lib. IV. *de*

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thing for a few days, may demand it back again within that time, if he himself have great need of it: because this [lending] is an act so beneficial in its nature, that it is not to be supposed that any one would thereby bind himself to his own great inconvenience. Thus he who has promised assistance to a federate ally, will be excused as long as he is in danger at home, so far as he has occasion for his powers. And a concession of immunity from tax and tribute must be understood with reference to daily and yearly taxes, not to those which some extreme necessity requires, and which the State cannot do without.

2 Whence it appears that Cicero spoke too laxly, when he said that your promises are not to be kept which are useless to those to whom they are made; nor if they harm you more than they advantage them. For whether the thing will be useful to him to whom it is promised, the promiser is not the judge, except perhaps when the promisee is mad, of which case we have spoken above: and in order

patris aut filii detineat. Et hoc recte Cicero *de Officiis* primo: *Si constitueris te cuipiam advocatum in rem præsentem esse venturum, atque interim graviter ægrotare filius cœperit, non sit contra officium non facere quod dixeris.* Cap. x.

3 In eundem sensum accipiendum, nec ultra trahendum est, [1]quod apud Senecam legimus: *Tunc fidem fallam, tunc inconstantiæ crimen audiam, si cum omnia eadem sint, quæ erant promittente me, non præstitero promissum, alioqui quicquid mutatur, libertatem facit de integro consulendi, et meam fidem liberat. Promisi advocationem: postea apparuit per illam causam præjudicium in patrem meum quæri: promisi me peregre una iturum: sed iter infestari latrociniis nuntiatur. In rem præsentem venturus fui: sed æger filius, sed puerpera uxor tenet. Omnia esse debent eadem quæ fuerint cum promitterem, ut promittentis fidem teneas.* Omnia intellige, pro actus ejus de quo quæritur natura, ut jam modo exposuimus. De Benef. iv. 35.

Beneficiis: Ad cœnam quia promisi ibo, etiamsi frigus erit, non quidem si nives cadent. Surgam ad sponsalia, quia promisi, quamvis non concoxerim, sed non si febricitavero. Sponsum descendam, quia promisi: sed non si spondere in incertum jubebis, si fisco obligabis. Subest, inquam, tacita exceptio, si potero, si debebo, si hæc ita erunt. Effice ut idem status sit cum exigitur, qui fuit, cum promitterem: destituere levitas non erit, si aliquid intervenit novi: quid miraris, cum conditio promittentis mutata sit, mutatum esse consilium? eadem mihi omnia præsta et idem sum. Vadimonium promittimus, tamen deseritur. Non in omnes datur actio, deserentem vis major excusat. Usi sæpe hoc effugio Angli. Vide Camdenum in anno cIↃ IↃ xcv. tum in controversia cum Batavis, tum in altera cum Anseaticis.

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that a promise may not oblige the promiser, it does not suffice that it brings some harm to the promiser; but it must be such harm as according to the nature of the act must be supposed to be excepted in the promiser. Thus he who has promised his neighbour so many days' labour, is not bound if a critical and dangerous disease of his father or his son keeps him away. So Cicero in his *Offices.* (I. 10.)

3 What Seneca says is to be taken in the same sense, and not to be pushed further: *I must keep my promise if all things are the same: but if anything be changed, I am at liberty to revise my decision. Thus I promised to advocate a cause; but it appears that the cause is intended to injure my father: I promised to accompany one on a journey; but it appears that the road is infested with robbers: I was to come at a certain time; but my son is ill, my wife is in childbirth. All must be the same as it was when I promised, to oblige me to keep my word.* Understand, *all things* according to the nature of the act in question, as we have just explained.

XXVIII. Diximus alia quoque esse posse signa voluntatis quæ ostendant casum eximendum. Inter ea signa nihil validius est quam verba alio loco posita, non ubi directe pugnant, quæ est ἀντινομία, cujus supra meminimus, sed cum velut insperato ex ipso rerum eventu inter se committuntur, quam Rhetores Græci vocant τὴν ἐκ περιστάσεως μάχην.

XXIX. 1 In hac disceptatione utra pars scripti cum ex casu fit collisio prævalere debeat, regulas quasdam ex antiquis auctoribus [k] Cicero posuit, quæ ut spernendæ neutiquam sunt, ita mihi non suo ordine videntur collocatæ. Nos eas hunc in modum digeremus. [l] Ut quod permittit cedat ei quod jubet: [4] quia qui permittit aliquid ita permittere videtur, nisi aliud quid obstet, quam de quo ibi agitur: ideoque, ut ait Scriptor Lib. ii. 10. ad Herennium, plus valet sanctio permissione. Ut quod faciendum est certo tempore, ei præferatur quod quovis tempore fieri potest: unde sequitur, ut plerumque pactio vetans vincat jubentem, quia pactio vetans obligat ad quodvis tempus, jubens

[k] *Cicero posuit*] De Inventione secundo, (cap. 49) et ibi Marius Victorinus.

[l] *Ut quod permittit, cedat ei quod jubet*] Quintilianus declamatione CCCLXXIV. *Semper potentior lex est quæ vetat, quam quæ permittit.* Donatus *Phormione* actu I. scen. 2 (vers. 76): *Bene jubet: minorem enim vim habet ea lex quæ aliquid permittit, quam illa quæ aliquid jubet.* Vide Ciceronem *Verrina* II. (cap. 51) et quæ habet Connanus libro I. c. 9.

[4] Modo scilicet Permissio sit generalis, jussum autem particulare: alias id quod jubetur universaliter cedit Permis-

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XXVIII. We have said that there may also be other signs of the will, which shew that the case is to be excepted. Among these signs, nothing is more decisive than words used in another place; not when they directly oppose the promise, which is *antinomy*, as mentioned above; but when unexpectedly and by the very event of things they are in conflict, which the rhetoricians call *circumstantial contradiction.*

XXIX. 1 In the discussion, Which part of a document ought to prevail in case of such a collision, Cicero has given certain rules from ancient authors; and these, though not, in my judgment, to be rejected, seem to me not to be placed in due order. We shall arrange them in this way:

Permission gives way to command, or, as the writer to Herennius says, command outweighs permission *:

What is to be done at a certain time, is to be preferred to what may be done at any time: and hence a prohibitive pact outweighs an imperative one: except either the time be expressed, or the command

* Barbeyrac says, not always: a universal command gives way to a particular permission.

non item, nisi aut tempus sit expressum, aut jussio tacitam prohibitionem contineat. Inter eas pactiones, quæ supradictis qualitatibus pares sunt, ut præferatur quod magis est peculiare, et ad rem propius accedit: nam solent specialia efficaciora esse generalibus: et in prohibitionibus, ut quæ pœnam adjunctam habet, ei quæ pœna vacat, et quæ majorem pœnam minatur, ei, quæ minorem, præferatur. Tum vero, ut superet quod causas habet aut magis honestas, aut magis utiles. Extremo loco, ut [5]quod postremo dictum est vincat.

2 Illud ex superioribus hic repetendum est, pactorum juratorum eam esse vim, ut intelligi debeant secundum receptissimam proprietatem, et ut omnes restrictiones tacitas, et ex natura rei non omnino necessarias, quam maxime repudient. Quare et si juratum pactum cum non jurato pugnet certo eventu, [m]præferendum erit [6]cui adest jurisjurandi religio.

XXX. Solet et hoc quæri, an in dubio contractus per-

sioni particulari; ut ad PUFENDORFIUM observatum est. *J. B.*

[5] Regula illa heic non bene aptatur. Illa enim valet, ubi omnimoda et perpetua est repugnantia inter utramque partem scripti: quum heic agatur de collisione in certis tantum casibus. Plura dicemus in Notis nostris Gallicis ad hunc locum. *J. B.*

[m] *Præferendum erit cui adest jurisjurandi religio*] Acontius apud Ovidium:

Promisit pater hanc: hæc et juravit amanti:
Ille homines, hæc est testificata Deam.
Hic metuit mendax, hæc et perjura vocari:
Num dubitas, hic sit major, an ille metus?

(Epist. Heroid. xx. 159. *et seqq.*)

[6] Hoc nititur falsa hypothesi, de qua suo loco monuimus. *J. B.*

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contains a tacit prohibition:

Between those pacts which are equal in the above qualities, that is to be preferred which is more peculiar, and comes nearer to the thing: for special expressions are commonly more efficacious than general:

In prohibitions, that which has a penalty added is to be preferred to that which has not, and that with the greater penalty, to that with the less:

That is to be preferred which rests upon causes more honourable or more useful:

Lastly, that which was last said has most weight*.

2 We must repeat that some pacts are to be understood according to the most received propriety of language, repudiating all tacit and unnecessary restrictions. Whence if a sworn pact be at variance with an unsworn one in a certain event, that is to be preferred which has the sanction of an oath.

XXX. It is also made a question, Whether in a doubtful case a

* Barbeyrac observes that this last rule is out of place here.

fectus censeri debeat antequam scriptura confecta sit, et tradita. Nam id Murena causabatur adversus ea, quæ inter Syllam et Mithridatem convenerant. Mihi apertum videtur, ni aliud convenerit, [n] credendum, scripturam adhiberi, ut monumentum contractus, non ut substantiæ ejus partem. Alioqui exprimi id solet, ut in judiciis cum Nabide: *Ex qua die descriptæ conditiones editæ Nabidi forent.*

Appian. *Mith.* p. 214.

Liv. xxxiv. 35.

Alc. v. *cons.* 17.

XXXI. Illud vero non admittam quod quibusdam placuit, contractus regum et populorum quantum fieri potest interpretandos ex jure Romano: nisi appareat inter quosdam populos jus illud civile in his, quæ juris sunt gentium, etiam pro jure gentium receptum esse: quod temere præsumendum non est.

ix. *Symp.* 13.

XXXII. De eo vero, quod Plutarchus in Symposiacis movet, conditionem offerentis, an accipientis verba attendi magis debeant, ita videtur, cum accipiens hic sit qui promittit, ejus verba formam dare negotio, si absoluta et in se perfecta sint. Nam si per affirmationem respiciant verba offerentis, tunc ea ipsa ex natura vocum relativarum repetita in promis-

[n] *Credendum scripturam adhiberi, ut monumentum contractus, non ut substantiæ ejus partem*] L. in re. 4. et l. si res gesta. 5. D. *de fide instrumentorum.* l. pactum quod bona fide, 17. C. de pactis: sic legem *contractus* quæ est 17. C. *de fide instrumentorum,* interpretantur Bartolus et Johannes Faber, Salicetus, quorum sententia in judiciis contra Baldum et Castrensem prævaluit. Mynsingerus decade x. cons. xci. Neostadius de pactis antenuptialibus, observatione xviii. quare non satis probabile est, quod Ligniacus adfert de instrumento a rege subscripto, sed nondum addito sigillo et secretarii manu, libro ii. rerum Italicarum Guicciardini.

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contract is to be held perfect before it is committed to writing and delivered. So Murena argued against the convention of Mithridates and Sylla. It appears plain to me that, except it be agreed otherwise, it must be supposed that writing is adopted as a monument of the contract, not as a part of it. If this is not so, it is expressed, as, *From the day when the conditions are written and delivered.*

XXXI. I do not admit, what many writers have held, that the contracts of kings and peoples are to be interpreted according to Roman Law; except when the Roman Law has been accepted as belonging to the Law of Nations; which is not lightly to be presumed.

XXXII. As to the question which Plutarch discusses in his *Symposium,* Whether the condition of the offerer or the words of the acceptor are more to be attended to; it appears that, since the acceptor is the promiser, his words must give force to the business, if they are absolute and

sione videbuntur. Antequam vero accepta sit conditio, ne eum quidem teneri qui obtulit certum est; nullum enim adhuc jus quæsitum est, ut ex his quæ de promissione supra diximus apparet. Et hæc oblatio conditionis minus est promissione.

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perfect. If by affirmation (as by saying *yes*) they respect the words of the offerer, then, from the nature of relative words, these are to be understood as repeated. But before the condition is accepted, the offerer is not bound; till then, the other part acquires no right, even in a promise; and an offer is less than a promise.

CAPUT XVII.

DE DAMNO PER INJURIAM DATO, ET OBLIGATIONE QUÆ INDE ORITUR.

I. *Culpam obligare ad restitutionem damni.*
II. *Damnum intelligi quod pugnat cum jure stricte dicto.*
III. *Accurate distinguendam aptitudinem a jure stricte dicto, ubi concurrunt:*
IV. *Damnum et ad fructus pertinere.*
V. *Ad lucrum cessans quomodo?*
VI. *Damnum dare facientes primario:*
VII. *Et secundario:*
VIII. *Item non facientes quod debent: primario,*
IX. *Et secundario:*
X. *Qualis efficacia circa actum ad hoc requiratur.*
XI. *Quo ordine teneantur.*
XII. *Obligationem extendi etiam ad damnum consequens.*
XIII. *Exemplum in homicida:*
XIV. *In eo qui alteri vim intulit:*
XV. *In adultero et stupratore:*
XVI. *In fure, raptore, et aliis:*
XVII. *In eo qui causam promissioni dedit per dolum aut metum injustum.*
XVIII. *Quid si metu justo naturaliter?*
XIX. *Quid de metu quem jus gentium pro justo habet?*
XX. *Potestates civiles quatenus teneantur ex damno per subditos dato: ubi quæstio de prædis in mari actis in socios contra imperium publicum.*
XXI. *Naturaliter ex animalis sui aut navis suæ facto sine culpa neminem teneri.*
XXII. *Damnum dari, et adversus famam et honorem, et quomodo reparetur.*

I. SUPRA diximus ejus, quod nobis debetur, fontes esse tres, pactionem, maleficium, legem. De pactionibus satis tractatum. Veniamus ad id quod ex maleficio naturaliter

[a] *Ex tali culpa obligatio naturaliter oritur*] Ἀμελίου δίκη Græcis. [Apud HESYCHIUM, qui exponit, ζημίου δίκην. *J. B.*] Vide in decretalibus titulum *de injuria et damno dato*, et Digestis *ad l. Aquiliam* et vicinas rubricas.

[1] Confer, in toto isto capite, PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. III. cap. 1. *J. B.*

[b] *Damnum forte a demendo dictum*]

CHAPTER XVII. *Of Damage with Wrong, and the Obligation thence arising.*

I. We have said above that there are three sources of debts due to us; Pact, Wrong, Law. Of pacts we have sufficiently treated: we come to what by Natural Law is due on account of Wrong. We have given the name of *wrong* to every fault, either of doing or of omission, which is at variance with what men ought to do, either on the ground of their common connexion, or of some special quality. From such

debetur. Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantem cum eo, quod aut homines communiter, aut pro ratione certæ qualitatis facere debent. [a]Ex tali culpa obligatio naturaliter oritur, si damnum datum est, [1]nempe ut id resarciatur.

II. 1 [b]Damnum forte a demendo dictum, est *τὸ ἔλαττον*, cum quis minus habet suo, sive illud suum ipsi competit ex mera natura, sive accedente facto humano, puta dominio, aut pacto, sive ex lege. Natura homini suum est vita, non quidem ad perdendum, sed ad custodiendum, corpus, membra, fama, honor, actiones propriæ. Dominio et pactis quomodo suum quid cuique sit, superior tractatio docuit, tum quoad res, tum quoad jus in actiones alienas. Simili modo ex lege jus suum cuique oritur, quia idem aut plus lex potest quam in se ac sua singuli. Sic pupillus jus habet exactam quandam diligentiam exigendi a tutore, respublica a magistratu, nec respublica tantum, sed et cives singuli, quoties lex id expresse aut per sufficientem consequentiam significat.

2 At ex sola aptitudine, quod jus minus proprie dicitur, et ab assignatrice justitia spectatur, non oritur verum dominium, ac proinde restitutionis obligatio: quia non id alicui

Ita Varro libro IV. *Damnum a demtione, cum minus re factum quam quanti constat.* (Pag. 41. *Edit. II. Steph.*) Alii magis probant derivari a græco δαπάνη, ut sit *dapnum*, deinde *damnum*, ut ὕπνος, *sopnus, somnus.* Nec absurde deducas a græco δάμνω, quod est βιάζω, aut ex ζημία, *damia, damnum,* ut *regia, regnum.*

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fault arises by Natural Law an obligation, if the wrong be accompanied with damage: namely, the obligation of repairing the wrong.

II. 1 Damage, *damnum* (perhaps from *demo,*) is when a man has less than what is *his,* whether it be *his* by mere nature, or by some human act in addition, as ownership, pact, law. Things which a man may regard as *his* by nature are life, not indeed to throw away, but to keep, his body, limbs, fame, honour, his own acts. What is his by ownership and pact, and how, we have shewn above, both as to things, and as to right over others' acts. In like manner the law determines for each what is his, for the law can do more for a man than he can do for himself. Thus a ward has a right to a certain care and diligence from his guardian; the State, from a magistrate; and not only the State, but each citizen, as often as the law expressly, or by clear implication, marks such a consequence.

2 But a mere Moral Claim, which is not properly a Right, and belongs to distributive or assignatory justice, does not produce true

Nic. v. 4. suum est ad quod aptus est: πλεονεκτεῖ οὐδὲν, ait Aristoteles, ὁ οὐ βοηθήσας χρήμασι δι' ἀνελευθερίαν· *Contra proprie dictam justitiam nihil committit, qui pecunia sua alteri non* Cap. 4. *succurrit, præ tenacitate.* Cicero pro Cn. Plancio: *Est hæc conditio liberorum populorum, posse suffragiis vel dare, vel detrahere quod velit cuique;* et tamen mox subdit, accidere ut populus faciat, quod velit, non quod debeat, voce debendi sumta in laxiore significatu.

Thom. et Caj. 2, 2. q. 62. art. 2. Soto, iv. q. 6. *Less.* ii. 12. *dub.* 18. et Covar. *ad c. Pecc.* p. 2. §7. III. Sed cavendum hic, ne confundantur quæ diversi generis sunt. Nam cui magistratus collatio mandata est, is reipublicæ tenetur ad eligendum eum qui dignus sit, et ad hoc exigendum respublica jus habet proprium: quare si ex indigni electione damnum fecerit respublica, ille resarcire tenebitur. Sic etiam civis aliquis non indignus, etsi jus proprium ad officium aliquod non habeat, habet tamen verum jus petendi juxta alios: in quo jure si per vim aut dolum impediatur, jam non totius rei expetitæ sed incerti illius damni æstimationem exigere poterit. Soto, iv. q. 7. *Less.* ii. 12. *dub.* 16. n. 3. Simile erit in eo, cui ne quid legaret testator, vi vel dolo fuit impeditus: nam capacitas legati jus quoddam

[2] Vide quæ fuse notavimus ad Libellum PUFENDORFII, *De Offic. Hom. et Civ.* Lib. I. cap. i. § 27. tertiæ et quartæ Edd. ubi de concursu ad facinus alienum accuratius, quam uterque Auctorum nostrorum, egimus. *J. B.*

[c] *Laudat*] Totilas in oratione ad Gotthos, apud Procopium *Gotthicorum* III. ὁ γὰρ ἐπαινέσας τὸν δεδρακότα, οὐδέν τι ἧσσον τῶν πεπραγμένων αὐτουργὸς γίνεται· *Nam qui facientem aliquid laudat, et ipse rei factæ auctor*

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ownership, and the consequent obligation of restitution: for that is not any one's to which he has merely a claim. *A man does not wrong any one when he refuses to give from illiberality,* says Aristotle. So Cicero.

III. But here we must take care not to confound things of diverse kinds: for he who has to appoint a magistrate is bound to the republic to elect one who is worthy; and the republic has a right to demand this: and therefore, if by an unworthy election he has produced damage to the republic, he is bound to make it good. So any citizen, not unworthy, although he has not a right to any office, yet has a right to be a candidate along with others; and if he is disturbed in this right by fraud or violence, he may demand, not the whole value of that which he sought, but the estimated value of his loss. So in the case of him to whom a testator was by force or fraud prevented from leaving a legacy; for the capacity to receive a legacy is a certain right, which has for its consequence this, that to impede the liberty of the testator as to that right, is a wrong.

IV. A person may have less than his own, and so, have suffered

est, cui id est consequens, ut libertatem testatoris in eo impedire injuria sit.

IV. Minus autem quis habere, ac proinde damnum fecisse intelligetur, non in re tantum, sed et in fructibus qui proprie rei fructus sunt, sive illi percepti sunt, sive non, si tamen ipse eos percepturus fuerat, deductis impensis quibus res melior facta est, aut quæ ad fructus percipiendos fuerunt necessariæ, ex regula quæ nos vetat locupletiores fieri cum aliena jactura.

V. Sed et spes lucri ex nostro æstimabitur, non ut illud ipsum, sed secundum propinquitatem ad actum, ut in semente spes messis. *L. in quant. 73. § mag. 1. D. ad Leg. Falcid.*

VI. Tenentur autem, præter ipsum qui per se et ἀμέσως damnum dat, alii quoque faciendo aut non faciendo. [2]Faciendo alii primario, alii secundario: primario, qui jubet, qui consensum requisitum adhibet, qui adjuvat, qui receptum præstat, aut qui alio modo in ipso crimine participat. Thom. 2, 2. 62. art. 4. Soto, iv. q. 6. art. 5.

VII. Secundario, qui consilium dat, [c]laudat, assentatur. *Quid enim interest* [d]*inter suasorem facti et probatorem?* ait Cicero Philippica secunda. Cap. 12.

VIII. Non faciendo item primario aut secundario; pri-

habendus est. (Cap. 25.) Ulpianus in Lib. I. c. de servo corrupto: *Et si erat servus omnimodo fugiturus, vel furtum facturus, hic vero laudator ejus propositi fuerit, tenetur: non enim oportet laudando augeri malum.*

[d] *Inter suasorem facti et probatorem*] Applicat hoc dictum Probo præfecto Ammianus, libro XXVII. (cap. 2.) Lege Langobardica, Lib. I. tit. 4. etiam consulens ad compositionem vocatur. Vide Rom. i. in fine, et ibi veteres scriptores.

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loss, not only in the thing which belongs to him, but in the produce of the thing, whether he has collected such produce, or only would have collected it: and his loss consists in that produce, *minus* the expense of improving the thing, and of collecting the produce.

V. Also the hope of gain from a thing which is ours may be estimated, not as what it is simply, but according to its prospect; as the hope of the harvest in the sower.

VI. Besides him who immediately causes the loss, others may be bound, either by doing or not doing.

By doing, some primarily, others secondarily: Primarily, he who commands it, who gives the requisite consent, who helps, who receives what is taken, or who participates in the crime in any other way.

VII. Secondarily, who advises, praises, approves. See Cicero.

VIII. Also by not doing, primarily and secondarily. Primarily, when one who by his proper right ought to forbid the act, or help the person wronged, does not.

mario, qui cum ex jure proprie dicto debeat vetare præcepto, [e]aut opem ferre ei cui fit injuria, id non facit. Is Chaldæo Paraphrastæ Levit. xx. 5. סעד obfirmator dicitur.

Less. ii. 13. *dub.* 10. IX. Secundario, qui aut non dissuadet cum debeat, aut factum reticet quod notum facere debebat. Illud autem debere in his omnibus referimus ad jus proprium quod justitia expletrix respicit, sive illud ex lege sive ex qualitate exoritur. Nam si debeat ex caritatis norma, peccabit quidem omittendo, non tamen ad reparationem tenebitur, cujus origo est jus aliquod proprium, ut ante diximus.

Thom. 2, 2. 62. art. 6. Soto, iv. q. 7. art. 3. X. Sciendum quoque hos omnes quos diximus ita teneri, si vere causa fuerint damni, id est, momentum attulerint, aut ad totum damnum, aut ad partem damni. Nam sæpe accidit in agentibus vel negligentibus secundarii ordinis, interdum etiam in quibusdam qui sunt ordinis primarii, ut etiam sine eorum actu aut neglectu is qui damnum dedit certus fuerit id ipsum dare: quo casu illi quos dixi non tenebuntur. Quod tamen non ita intelligendum est, ut si alii defuturi non fuerint, puta qui suaderent, aut juvarent, non teneantur qui suaserint, aut juverint, si absque ope aut consilio qui dedit damnum da-

Cajet. *ad q.* 62. art. 6. Medin. q. 7.

[e] *Aut opem ferre ei cui fit injuria, id non facit*] Nicetas Choniates Michaele Comneno: ὁ ἐμπρησμὸς, οὐ μόνον τοῦ ἀνάψαντος, ἀλλὰ καὶ τοῦ κατασβέσαι δυναμένου, δρᾶσαι δέ τι τοιοῦτον ὅλως μὴ βουληθέντος· *Incendium non ei tantum imputatur qui facem intulit, sed et ei, qui prohibere cum posset, omnino noluit.* (Lib. I. c. 3.)

[f] *Si totus actus ab ipsis, quanquam*

IX. Secondarily, he who does not dissuade when he ought, or keeps silence about a fact which he ought to make known. And this *ought*, in all these cases, we refer to proper rights and expletory justice, whether arising from law or quality. For if he ought by the law of charity only, he sins indeed in not doing it, but is not held to reparation; for this has its origin in a proper right, as we have said.

X. It is to be noted also, that all those of whom we have spoken are bound if they were really the cause of the damage, that is, if their influence shared in producing either the whole loss or a part of it. For it often happens in agents or *negligents* of the secondary order, and sometimes in those who are of the first order, that even without their act or neglect, the person who committed the damage was certain to commit it: in which case they will not be liable. Which answer is not so to be understood as, that if others would not have been wanting to persuade or assist, those who did persuade or assist are not liable; if without suasion or assistance the author of the damage would not have done it. For those others who should have persuaded

turus id non fuisset. Nam et illi alii si suasissent aut adjuvissent, tenerentur.

XI. Tenentur autem primo loco ii, qui imperio aut alio modo aliquem impulerunt ad factum: his deficientibus patrator facinoris: et post eum ceteri, in solidum singuli qui ad actum causam dederunt, [f]si totus actus ab ipsis quamquam non solis processit. Less. ii. 13. dub. 5. Ibid. dub. 4.

XII. Qui vero de actu tenetur, [g]simul tenetur de his quæ illum ex actus vi sunt consecuta. [h]In Senecæ controversia quadam hoc tractatur in specie platani incensæ, ex qua domus arserat, ubi hanc ponit sententiam: *Etiamsi partem damni dare noluisti, in totum quasi prudens dederis tenendus es; ex toto enim noluisse debet, qui imprudentia defenditur.* Ariarathes Cappadocum rex eo quod Melani amni exitum per lasciviam obstruxerat, cum ejus perrumpentis impetu elatus Euphrates rapta parte Cappadocum terræ, magna et Galatis et Phrygibus damna intulisset, permisso Romanis judicio, talentis trecentis dispendium sarcivit. Excerp. Contr. v. 5. Strabo, xii. 539.

XIII. Exemplo hæc sint. Homicida injustus tenetur solvere impensas, si quæ factæ sunt in medicos, et iis quos occisus Less. ii. 9. dub. 19.

non solis, processit] Lex Langobardica, Lib. I. tit. ix. 5.

[g] *Simul tenetur de his quæ illum ex actus vi sunt consecuta*] Vide Thomam primæ secundæ quæst. xx. art. 5 et l. si servus servum. 27. § si quis insulam 8. D. ad l. Aquiliam.

[h] *In Senecæ controversia*] Excerptis v. 5.

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or assisted would have been liable.

XI. Those are liable in the first place, who, by command, or in any manner, impel any one to the act: failing these, the perpetrator of the deed; after him, the rest in any way concerned; and those jointly who gave cause to the act, if the whole act proceeded from them, though not from them alone.

XII. They who are liable for the act, are also liable for the natural consequences of the act. Seneca puts a case of a man setting fire to a plane-tree, by which a house was burnt, and holds him liable. [See.] Ariarathes, having wantonly stopped the course of the river Melanus, caused a flood of the Euphrates, which produced great damage in Galatia and Phrygia: and the matter being referred to the Romans, paid 300 talents to make good the loss.

XIII. Take these examples: A person who unlawfully kills another is bound to pay the expenses of physicians, if any, and of those who depended for subsistence on the person killed, his parents, wives, children, as much as their hope of support was worth, con-

alere ex officio solebat, puta parentibus, uxoribus, liberis dare tantum, quantum illa spes alimentorum, ratione habita ætatis occisi, valebat: sicuti Hercules legitur Iphiti a se occisi liberis multam pependisse, quo facilius expiaretur. Michael Ephesius ad quintum Nicomachiorum Aristotelis: ἀλλὰ καὶ ὁ φονευθεὶς ἔλαβε τρόπον τινά. ὃ γὰρ ἡ γυνὴ ἢ οἱ παῖδες, ἢ οἱ συγγενεῖς τοῦ φονευθέντος ἔλαβον, τρόπον τινὰ ἐκείνῳ δέδοται· *Sed et qui occisus est, accipit aliquo modo. Quæ enim uxor ejus et liberi et cognati accipiunt, ipse quodammodo accipit.* Loquimur de homicida injusto, id est, qui non habuit jus id faciendi unde mors sequitur. Quare si quis jus habuerit, sed in caritatem peccaverit, ut qui fugere noluit, non tenebitur. Vitæ autem in libero homine æstimatio non fit; secus in servo, qui vendi potuit.

Diod. iv. 31.

Cap. 2.

Less. *dub.* 21. Navar. c. 15. n. 22.

XIV. [i]Qui mutilavit, similiter tenebitur ad impensas et ad æstimationem ejus quod jam, qui mutilatus est, minus poterit lucrari. Sed sicut ibi vitæ, ita et hic cicatricis in libero homine æstimatio non fit. De conjectione in carcerem idem dicendum.

L. ult. D. de his qui effud. vel dej.

XV. Sic adulter et adultera tenentur non tantum indemnem præstare maritum ab alenda prole, sed et legitimis liberis

Less ii. 10. *dub.* 6.

[i] *Qui mutilavit, similiter tenebitur ad impensas et ad æstimationem ejus, quod jam qui mutilatus est minus poterit lucrari*] Idem apud Hebræos servatum, Baba Kama, cap. 8. § 1. et apud Anglos et Danos, quorum fedus vide apud

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sidering the age of the person killed. So Hercules paid a fine for the death of Iphitus. So Michael Ephesius on Aristotle. We say *unlawfully* kills; for if a person was acting lawfully, as if he was assailed and did not run away, though he may have sinned against charity, he is not liable. The life of a free man cannot be valued: it is different in a slave, who may be sold.

XIV. If a person maims another, he is similarly liable to the expenses, and to the estimated value of how much less the maimed man can earn. But as the free man's life, so his wound, is not capable of estimation. The same is to be said of unjust imprisonment.

XV. The adulterer and adulteress are liable not only to indemnify the husband for the expenses of rearing the progeny, but also to repay the legitimate offspring what loss they suffer from the concourse of the offspring so arising in the inheritance.

He who deflowers a virgin by force or fraud is bound to pay her as much as she loses by the diminished hope of marriage; and even to marry her if it was by such a promise that he became master

rependere, si quod damnum patiuntur ex concursu ita susceptæ sobolis ad hereditatem. Qui virginem imminuit vi, aut fraude, tenetur ei rependere quanti minoris ipsi valet spes nuptiarum: imo et ducere tenetur, si ea promissione corporis usuram impetraverit. Less. ii. 10. *dub.* 2. et 3.

XVI. Fur et raptor tenentur rem subtractam reddere cum suo incremento naturali, et cum sequente damno aut cessante lucro: et si res perierit, æstimationem non summam, non infimam, sed mediam. In hac classe ponendi et illi qui legitima vectigalia fraudant. Similiter tenentur qui judicio injusto, accusatione injusta, testimonio injusto damnum dederunt. *Ibid.* c. 12. *dub.* 17. Less. ii. 33. *dub.* 8. Covar. *c. Pec.* p. 2. § 5.

XVII. Sed et qui contractui aut promissioni causam dedit dolo, vi, aut metu injusto, tenetur eum quicum actum est in integrum restituere, quia ille jus habuit, tum ne deciperetur, tum ne cogeretur; illud ex natura contractus, hoc ex naturali etiam libertate. His annumerandi sunt qui id quod ex officio facere tenebantur facere noluerunt, nisi pecunia accepta. Covar. *c. Pec.* p. 2. § 3.

XVIII. At qui causam dedit, cur vim pati, aut metu cogi debeat, habet quod sibi imputet: nam involuntarium ex voluntario ortum habens moraliter pro voluntario habetur. Less. ii. 17. *dub.* 6.

doctissimum Pontanum dissertatione de mari. [*Discuss. Historic.* &c. Lib. II. cap. 21. ubi tamen nil legitur, quod ad rem faciat. Est tantum aliquid de mulcta ab homicida heredibus occisi pendenda, pag. 143. *J. B.*]

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of her person.

XVI. The thief and the robber are bound to restore the thing subtracted, with its natural increase, and with the consequent loss, or consequent cessation of gain; and if the thing have perished, its estimated value, not the highest, nor the lowest, but the medium value. In this class are to be placed those who defraud the lawful taxes. Also those are liable who by false testimony have occasioned damage in an unjust sentence, or an unjust accusation.

XVII. Also he who has caused a contract or promise by fraud, trick, or violence, is liable to restore to his original condition him who has been thus dealt with: because he had a right not to be deceived, and not to be forced: the former, from the nature of a contract, the latter from natural liberty as well. To these are to be reckoned those who would not do, except for money given, what they were bound to do for their office.

XVIII. He who gave cause why he should suffer force, or be compelled by fear, has himself to blame for what happens: for

XIX. At gentium consensu sicut introductum est, ut bella omnia summæ potestatis auctoritate utrinque gesta et indicta pro justis habeantur, quoad effectus externos, qua de re infra dicemus: ita et hoc, ut talis belli metus hactenus pro justo habeatur, ne quod ita obtentum est repeti possit. Atque hoc sensu admitti potest distinctio Ciceronis, inter hostem, quicum multa jura habemus, ut ait, communia, ex gentium consensu scilicet, et piratas ac latrones. Nam hi si quid metu expresserunt repeti potest, nisi jusjurandum intercesserit: quod illi, non item. Quare quod Polybio videtur justam fuisse Carthaginiensibus causam belli Punici secundi, quod Romani ab ipsis mercenariorum seditione occupatis bello denuntiato Sardiniam insulam et pecuniam expressissent, habet naturalis æquitatis aliquam speciem, sed a jure gentium abit, ut alibi explicabitur.

Bodin. *L.* v. *De Repub.* c. 6. *De Offic.* iii. 29.

Lib. iii. 13. *et seqq.*

XX. 1 Ex neglectu tenentur reges ac magistratus, qui ad inhibenda latrocinia et piraticam non adhibent ea quæ possunt ac debent remedia: quo nomine damnati olim ab Amphictyonibus Scyrii. Quæsitum memini ex facto, cum patriæ nostræ rectores potestatem prædarum in mari ex hoste agendarum per codicillos plurimis dedissent, et eorum nonnulli res

Plut. *in Cimon.* p. 483 c.

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an involuntary act arising from a voluntary one is held morally for a voluntary one.

XIX. As, by the consent of nations, a rule has been introduced, that all wars, conducted on both sides by authority of the sovereign power, are to be held just wars; so this also has been established, that the fear of such a war is held a justly imposed fear, so that what is obtained by such means cannot be demanded back. And here the distinction appears between an enemy and pirates or robbers*. For what these take, may be demanded back, except an oath have been introduced to prevent it; what those take, not so. Wherefore, what appears to Polybius to be a just cause for the Carthaginians beginning the second Punic war, that the Romans had before made war upon them when they were engaged with the mutiny of their mercenaries, and had wrung from them the island of Sardinia, and a money payment, has some shew of natural equity, but is at variance with the Law of Nations, as we shall elsewhere explain.

XX. 1 Kings and magistrates are liable for neglect, who do not apply the remedies which they can and ought, to restrain robbery and piracy: on which ground the Scyrians were in ancient times condemned by the Amphictyons. I recollect the question being proposed to me,—from the fact when the rulers of our country had given

* And so the connexion between "private war" and public war disappears. W.

amicorum rapuissent, desertaque patria mari vagarentur, ac ne revocati quidem redirent, an rectores eo nomine tenerentur, aut quod malorum hominum usi essent opera, aut quod cautionem non exegissent. Dixi eos in nihil amplius teneri, quam ut noxios, si reperiri possent, punirent aut dederent: præterea in bona raptorum jus reddi curarent. Nam ipsos injustæ prædationis causam non fuisse, nec quicquam de ea participasse; prohibuisse etiam legibus ne amicis noceretur: cautionem ut exigerent nullo jure fuisse obligatos, cum possent, etiam sine codicillis, omnibus subditis hostem spoliandi potestatem facere, quod et factum olim esset: neque talem permissionem causam esse cur damnum datum esset sociis, cum possent privati etiam sine permissu tali naves armare et in mare progredi. Mali vero an futuri illi essent provideri non potuisse; neque vero vitari posse quo minus et malorum opera utamur, alioqui nullum colligi posse exercitum.

2 Neque vero si quid milites, aut terrestres, aut nautici contra imperium amicis nocuissent, reges teneri: quod [k] Galliæ et Angliæ testimoniis probatum. Ut vero sine culpa sua ex ministrorum facto quisquam teneatur, non esse juris gentium, *Const. Gall.* Tom. III. tit. 3. *const.* ann. 1583. c. 44.

[k] *Galliæ*] Vide etiam tomo constitutionum III. tit. 2. constitutione anni CIↃ IↃ XLIII. cap. 44.

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several persons letters of privateering and authority to make captures, and some of these persons had captured the property of friends, and, leaving their country, led a life of sea-rovers, not returning even when summoned home;—Whether the rulers were bound to restitution; either as having used the agency of bad men, or as not having demanded caution-money. I gave my opinion, that they were bound to nothing more than to punish and surrender the guilty persons, if they could be found; and, besides, to make the goods of the plunderers liable: for that they had not been the cause of the unlawful spoliation, nor had in any way shared in it; and had forbidden by law the plunder of friends: that there was no law obliging them to demand caution-money, since they might, if they chose, give all their subjects the right of capturing enemy's goods, which in former times had been done: and that such permission was not the cause why friends had been damaged, since private persons, even without such permission, could arm vessels and go to sea. And that whether those who went would turn out good or bad men, could not be foreseen; nor was it avoidable to use the agency of bad men as well as good, since otherwise no army could be got together.

2 Nor, if either soldiers or sailors, contrary to command, do any damage to friends, are the kings liable; which has been proved by the

ex quo dijudicanda esset hæc controversia, sed juris civilis, nec generalis, sed adversus nautas et alios quosdam ex rationibus peculiaribus introductum. Atque in eam partem a supremi auditorii judicibus contra Pomeranos quosdam pronuntiatum est, idque ad exemplum rerum in causa non dispari, ante duo sæcula, judicatarum.

XXI. Illud quoque notandum est, ut mancipium aut animal quod damnum, aut pauperiem fecit, noxæ dedatur, itidem ex jure civili esse. [3] Nam dominus, qui in culpa non est, natura ad nihil tenetur: ut nec is, cujus navis sine ipsius culpa navi alterius damnum dedit: quamquam multorum populorum legibus, ut et nostra, damnum tale dividi solet ob culpæ probandæ difficultatem.

XXII. Sed damnum, ut diximus, etiam adversus honorem et famam datur, puta verberibus, contumeliis, maledictis, calumniis, irrisu, aliisque similibus modis. In quibus non minus quam in furto atque aliis criminibus vitiositas actus ab effectu discernenda est. Nam illi pœna respondet, huic damni repa-

Less. ii. 11. *dub.* 19, 25, 27. Soto, iv. q. 6. art. 3.

[3] Hoc verum quidem est de Animali bruto, quod, utpote ratione destitutum, damnum proprie dictum dare nequit. At alia est ratio de Mancipio; ut ostendimus in Gallicis nostris Notis ad hunc locum. *J. B.*

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testimony both of France and England: that any one, without any fault of his own, is bound by the acts of his agents, is not a part of the Law of Nations; by which this controversy must be decided, but a part of the Civil Law; nor of that in general, but introduced against sailors, and certain others, for peculiar reasons. And sentence was given to that effect by the Judges of the Supreme Court, against certain Pomeranians; and that, according to the precedent of a similar cause, adjudged two centuries ago.

XXI. It is to be noted also that the rule, that if a slave, or any animal, cause any damage or loss, it creates a liability in the master, is also a creation of Civil Law. For the master, who is not in fault, is not liable by Natural Law; as also he is not whose ship, without any fault of his, damages another's ship: although by the laws of many nations, and by ours, the damage in such case is commonly divided, on account of the difficulty of proving where the fault lay.

XXII. Damages also, as we have said, may be inflicted on a man's honour or reputation; as with blows, insults, abusive language, calumny, ridicule, and the like. In which cases, no less than in theft, and other offenses, the badness or malice of the act must be distinguished from the damage. For the badness of the act is a ground for punishment, the loss, for reparation: which, in this case, is made

ratio, quæ fit culpæ confessione, [1]exhibitione honoris, testimonio innocentiæ, et per ea quæ his similia sunt: quanquam et pecunia tale damnum rependi poterit, si læsus velit, quia pecunia communis est rerum utilium mensura.

[1] *Exhibitione honoris, testimonio innocentiæ*] Vide exemplum Viviani, qui accusationis injustæ pœnitentia ductus est, apud Cassiodorum IV. 41.

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by confession of the fault, manifestation of respect, testimony of the innocency of the calumniated person, and the like: though such damage may also be recompensed by money, if the injured person choose; because money is the common measure of valuable things.

CAPUT XVIII.

DE LEGATIONUM JURE.

I. *Obligationes quasdam ex jure gentium nasci, ut jus legationum.*

II. *Inter quos locum habeat.*

III. *An semper admittenda legatio.*

IV. *Adversus legatos periculosa molientes defensionem licitam, non exactionem pœnæ.*

V. *Legationis jure non teneri eum, ad quem legatus missus non est.*

VI. *Hostem ad quem missus est legatus teneri:*

VII. *Nec opponi posse jus talionis.*

VIII. *Jus hoc et ad comites legatorum porrigi: si legati voluerint.*

IX. *Et ad bona mobilia.*

X. *Exempla obligationis, sine cogendi jure.*

XI. *Quanti sit hoc jus legationis.*

I. HACTENUS ea memoravimus, quæ ex jure naturæ debentur nobis, paucis duntaxat additis de gentium jure voluntario, quatenus ab eo aliquid erat juri naturæ superad-

[1] Jus Legationum, in se spectatum, vere oritur a Jure Naturali, ut ostendit PUFENDORFIUS, *De Jure Nat. et Gent.* Lib. II. cap. iii. § 23. Quæ autem privilegia moribus gentium tantum originem debent, illa nemo tenetur Legatis concedere, nisi velit, et pacto vel expresso, vel tacito, ad illa concedenda sese obstrinxerit. *J. B.*

[a] *Sanctimoniam legatorum*] Pomponius l. *si quis.* ult. D. *de Legationibus: Si quis legatum hostium pulsasset, contra jus gentium id commissum esse existimatur, quia sancti habentur legati: et ideo si cum legati apud nos essent gentis alicujus, bellum cum eis indictum sit, liberos eos manere. Id enim juri gentium conveniens esse. Itaque eum, qui legatum pulsasset, Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondere.* Lege Julia de vi publica tenetur, quod ad legatos oratores, comitesve attinebit, si quis eorum quem pulsasse sive injuriam fecisse arguetur, Ulpiano respondente in l. *lege Julia,* 7. D. *ad legem Juliam de vi publica.* Josephus *Antiquæ Historiæ* libro XV. cap. 8. multum prædicat legatorum sanctimoniam, quibus ait commune cum angelis Dei nuntiis nomen. Varro, Lib. III. *de Lingua Latina: Sancta sunt corpora legatorum.* Cicero, *Verrina* III. *Legatorum jus divino humanoque vallatum præsidio, cujus tam sanctum et venerabile nomen esse debet, ut non modo inter sociorum jura, sed et hostium tela incolume versetur.* Scriptor vitæ Epaminondæ: [Immo Pelopidæ. CORN. NEPOS, c. V. n. 1.] *Cum legationis jure se tectum arbitraretur, quod apud omnes gentes sanctum esse consuesset.* Diodorus Siculus in excerptis Peiresianis, Pag. 349. τὴν ἄδειαν vocat τῆς τῶν πρεσβευτῶν ἀσυλίας· *securitatem a legatorum sanc-*

CHAPTER XVIII. *Of the Right of Legation.*

I. Hitherto we have spoken of things which are due to us by Natural Law, adding only a few points which belong to the instituted Law of Nations, in so far as by that any thing was added to the Law of Nature. It remains to speak of the obligations which that which

ditum. Restat veniamus ad obligationes quas ipsum per se jus illud gentium, quod voluntarium dicimus, induxit: quo in genere [1]præcipuum est caput de jure legationum. Passim enim legimus sacra legationum, [a]sanctimoniam legatorum, jus gentium illis debitum, jus divinum humanumque: sanctum inter gentes jus legationum, fœdera sancta gentibus, fedus humanum: sancta corpora legatorum: Papinio (*Thebaid.* II. 486):

Sanctum populis per sæcula nomen.

Cicero de haruspicum responsis: *Sic enim sentio, jus legatorum cum hominum præsidio munitum, tum etiam divino jure esse vallatum.* Itaque hoc violare non injustum tantum esse, [b]sed et impium omnium confessione, ait Philippus in epistola ad Athenienses. Cap. 16. Ap. Demosth. p. 62 A.

timonia. Apud Papinium Lib. II. (Theb. vers. 373):

tutique regressus
Legato.

Chrysostomus: *καὶ οὐδὲ τὸν κοινὸν νόμον ᾐδέσθησαν, ὅτι ὁ πρεσβεύων οὐδέποτε πάσχει τι κακόν· ne commune quidem fas hominum reveriti sunt, quod tutos præstat legatos ab omni malo.* Servius ad XI. *Æneidos* (vers. 101): *ab omni injuria tectis jure gentium.* Ne omnia loca enotem, adde Livium Lib. I. *de Laurentibus,* (cap. 14) Dionem Chrysostomum *de Lege et Consuetudine,* Velleium Paterculum initio Lib. II. Menandrum Protectorem, (Exc. Legat. 19) Epistolam Felicis ad Zenonem in appendice codicis Theodosiani data a Sirmundo. Totilas apud Procopium *Gotthicorum* III. *πᾶσι μὲν, ὡς ἐπὶ πλεῖστον εἰπεῖν, νόμος βαρβάροις, τὸ χρῆμα τῶν πρεσβέων σέβειν· omnibus, ut generatim loquar, barbaris mos legatos venerari.* (Cap. 16.) Idem de barbaris dixit Scafnaburgensis. Aimonius regi Clodovæo hæc dicta tribuit: *Ad extremum pro divinis simul humanisque legibus, quæ injuriarum immunes sanciunt, debere esse eos qui mediatores hostilium efficiuntur armorum. Inter arma namque sola legatio pacis sequestra est. Exuit hostem qui legatione fungitur.* Vide et Radevicum in appendice. *De Polonis* vide Cromerum libro XX. *De Turcis* Leunclavium libro VIII. et libro XVII. *De Mauris* Marianam libro XII. c. 14. [Apud Varronem non exstant verba, quæ tamquam ex illo adfert Auctor, circa initium Notæ istius. Errorem hausit e nota Dionys. Gothofredi in L. 17 D. *De Legation.* ubi hic pro verbis Varronis laudat, quod Cujacius dicit *Observ.* XII. 5. post indicatum Varronis fragmentum e Lib. III. *De Vita populi Rom.* quod servavit NONIUS MARCELLUS, p. 529. *Edit. Mercer.* Apud Velleium Paterculum etiam, Lib. II. cap. 2. initio, nihil est quod huc faciat; et Auctor ipse locum illum, juxta rerum sensum, supra adtulit, cap. XV. § 16. num. 2. in fine. Locus Ciceronis non est ex Verrin. III. sed e Lib. I. in Verr. c. 33. et prima etiam ejus verba petita sunt ex *Orat. De Haruspic. Respons.* cap. 16. *J. B.*]

[b] *Sed et impium*] Ἔργον ἀσεβὲς, ait Plutarchus in *Vita Æmilii,* narrans

we call the Instituted Law of Nations has of itself introduced: in which class, the principal head is the Right of Legation. For we everywhere read of the reverence for Embassies, the sacredness of Ambassadors; the Rights of Nations lodged in them by Divine and Human Law; all which belong to those Instituted Laws; with other

II. 1 Sed primum sciendum est, qualecunque est hoc jus gentium de quo videbimus, ad eos legatos pertinere, quos mittunt qui summi imperii sunt compotes inter se; nam qui extra hos legati sunt provinciales, municipales, atque alii, non jure gentium, quod inter gentes est diversas, sed jure civili reguntur. Legatus apud Livium publicum se nuntium populi Romani vocat. Apud eundem Livium alibi senatus Romanus jus legationis externo, non civi comparatum ait: et Cicero ut ostendat non esse legatos mittendos ad Antonium: *Non enim*, inquit, *cum Annibale res est, hoste reipublicæ, sed cum cive.* Qui autem externi habendi sint ita clare exposuit Virgilius, ut nemo jurisconsultorum possit clarius:

Lib. i. 32.
Lib. vi. 17.
Philip. v. 10.
Æn. vii. 369.

> Omnem equidem sceptris terram quæ libera nostris
> Dissidet, externam reor.

2 [c] Qui ergo impari junguntur federe, cum sui juris esse non desinant, jus habebunt legationis: immo et hi qui ex parte subditi sunt, ex parte non sunt, pro ea parte qua non sunt

Gentii factum, (p. 261.) Josephus libro xv. *Historiæ Antiquæ: τοῦτο τὸ ὄνομα καὶ πολεμίους πολεμίοις διαλλάττειν δύναται· ποῖον οὖν μεῖζον ἂν γένοιτο ἀσέβημα ἢ πρέσβεις ἀποκτεῖναι, τοὺς ὑπὲρ τοῦ δικαίου διαλεγομένους*; *Hoc nomen et hostes hostibus valet reconciliare; quid ergo fieri magis impium potest, quam legatos occidere pro æquitate loquentes?* (Cap. v. § 3. pag. 753.)

[c] *Qui ergo impari junguntur federe*] Cromerus xxx.

[d] *Puta cum ita divisus est populus*] Vide de legatis civitatis Toleti ad regem Johannem, Marianam libro xxii. 8. *de*

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the like phrases. [See other phrases in the text. Papinius Statius; Cicero.] To violate this is not only unjust, but impious, by the confession of all; as Philip says.

II. 1 But, in the first place, this Law of Nations, whatever it be, applies to those Ambassadors only who are sent by Sovereign Powers to one another. For those who are sent as representatives of provinces, towns and others, are not governed by the Law of Nations, that is, by International Law, but by the Civil Law. An Ambassador, in Livy, calls himself the Public Messenger of the Roman People. And again, the Senate says that the Right of Legation belongs to a foreigner, not to a citizen. And Cicero, arguing that ambassadors should not be sent to Antony, says, *For we have not to deal with Annibal, an enemy of the State, but with a citizen of the State.* Virgil explains clearly who are strangers (*Æn.* vii. 369).

2 Those states which are joined by an unequal league, when they do not cease to be their own masters, will have the Right of Legation: and also those who are only partly subject, for the part in which they are not subject. But kings who have been conquered in a formal

subditi. At reges qui bello solenni victi, regnoque exuti sunt, cum aliis regni bonis et jus legandi perdiderunt. Ideo Persei a se victi caduceatores retinuit P. Æmilius.

3 In bellis vero civilibus necessitas interdum locum huic juri facit, extra regulam, [d]puta cum ita divisus est populus in partes quasi æquales, ut dubium sit ab utra parte stet jus imperii; aut cum jure admodum controverso de regni successione duo decertant. Nam hoc eventu gens una pro tempore quasi duæ gentes habetur. Ita [e]Flavianos accusat Tacitus, quod *Hist.* iii. 80. sacrum etiam inter exteras gentes legatorum jus in Vitellianis civili rabie temerassent. Piratæ et latrones, qui civitatem non faciunt, jure gentium niti non possunt. Tiberius cum ad eum Tacfarinas legatos misisset, indoluit, quod desertor et prædo hostium more ageret: quæ verba sunt Taciti. *Ann.* iii. 73. Sed interdum tales qui sunt, jus legationis nanciscuntur fide data, ut olim fugitivi in saltu Pyrenæo. Cæsar. *de Bell. Civ.* iii. 19.

III. 1 Duo autem sunt de legatis quæ ad jus gentium referri passim videmus, prius [f]ut admittantur, deinde ne vio-

Flandris Crantzium *Saxonicis* XII. 33.

[e] *Flavianos accusat Tacitus*] Et Magnentium Zosimus libro II. Μαγνέντιος δὲ καθ' ἑαυτὸν ἔστρεψε γνώμην, πότερον χρὴ Φίλιππον ἄπρακτον ἀποπέμπειν, ἢ κατέχειν παρ' ἑαυτῷ τὸν ἐπὶ τοῖς πρέσβεσι πατοῦντι θεσμόν. *Magnentius apud animum suum volvebat, deberetne Philippum irritum dimittere, an apud se retinere calcato jure legationum.* Is Philippus a Constantio venerat. (Cap. 47. *Ed. Cellar.*)

[f] *Ut admittantur*] Donatus ad prologum Hecyræ: *Oratorem audire oportere jus gentium est.* (Ad vers. 1.)

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war, and deprived of their kingdom, along with their other possessions, lose the right of legation. So P. Æmilius retained the negotiators who came from Perseus, whom he had conquered.

3 But in civil wars, necessity sometimes makes room for this right, *extra regulam:* for instance, when the people is divided into nearly equal parties, so that it is doubtful with which party the right of the supreme authority is: or when two claimants for the succession contend with very balanced pretensions. For in such an event, one nation is, for the time, two nations. Thus Tacitus accuses the Flavians that the right of Legation, which is sacred even between strangers, they had savagely violated in the case of the Vitellians. Pirates and robbers, who do not make a State, cannot claim the right of legation. Tiberius, when Tacfarinas sent ambassadors to him, was disturbed that a deserter and a robber gave himself the air of an open enemy, as Tacitus says. But sometimes such persons obtain a right of legation by promise given them on good faith, as was the case with a band of fugitives in the Pyrenees.

III. 1 There are two points with regard to ambassadors which

Lib. xxi. 10. lentur. De priore locus est Livii, ubi Hanno senator Carthaginiensis in Annibalem sic invehitur: *Legatos ab sociis, et pro sociis venientes bonus Imperator vester in castra non admisit: jus gentium sustulit.* Quod tamen non ita crude intelligendum est: [g]non enim omnes admitti præcipit gentium jus: sed vetat sine causa rejici. Causa esse potest ex eo qui mittit, ex eo qui mittitur, ex eo ob quod mittitur.

Thuc. ii. 12. 2 Melesippus Lacedæmoniorum legatus, auctore Pericle, dimissus est extra fines agri Attici, quod ab hoste armato Zonar. Tom. II. (ix. 13.) veniret. Sic [h]senatus Romanus negavit se Carthaginiensium legationem admittere posse, quorum exercitus esset in Italia. Liv. xli. 29. Persei adversus Romanos bellum molientis legatos non admiserunt Achæi. Sic Totilæ sæpe perfidi legationem rejecit Jus- Procop. iii. 37. et ii. 19. tinianus, et Gothi, qui Urbini erant, Belisarii oratores. Cynethensium quoque, ut gentis sceleratæ, legatos undique pulsos

[g] *Non omnes admitti præcipit gentium jus*] Vide Camdenum in anno cIↃ IↃ LXXI. quæstionum ibi propositarum quarta.

[h] *Senatus Romanus negavit se Carthaginiensium legationem admittere posse, quorum exercitus esset in Italia*] De hoc Romanorum more vide Servium ad VII. *Æneidos,* (vers. 168.)

[i] *Ubi causa mittendi aut suspecta est*] Sic Andreas Burgus Cæsaris legatus in Hispaniam non admissus: Mariana libro XXIX. (cap. 15.) Simile apud Cromerum libro XX.

[k] *Intra decem dies Italia excederent*] Carolus Quintus Imperator legatos Galliæ, Venetorum, et Florentinorum ad bellum sibi indicendum missos deduci

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we everywhere find referred to the Law of Nations: that they be admitted, and that they be not violated.

Of the first point; Hanno inveighs against Annibal, that, not admitting the ambassadors of the allies, he had violated the Law of Nations. Which however is not to be understood so absolutely; for the Law of Nations does not prescribe that all ambassadors are to be admitted; but that they are not to be excluded without cause.

The cause may be on the part of him who sends, of him who is sent, or in the fact that he is sent.

[Examples of the first case.]

2 Melesippus, the ambassador of the Lacedæmonians, was dismissed beyond the borders of the Attic territory, by the advice of Pericles, because he came from an armed enemy [within the territory]. So the Roman Senate declared that no embassy of the Carthaginians could be received while their army was in Italy. The Achæans did not admit the ambassadors of Perseus, when he was organizing a war against the Romans. So Justinian rejected the embassy of Totila, who had often broken his faith; and the Goths at Urbino sent back the ambassadors of Belisarius. So Polybius relates that the ambassadors of the

narrat Polybius. Secundi exemplum est in Theodoro, qui ἄθεος vocabatur, quem a Ptolemæo ad se missum audire Lysimachus noluit: idemque aliis evenit peculiaris odii causa. Tertium quod diximus locum habet, [i]ubi causa mittendi aut suspecta est, ut Rhabsacis Assyrii legatio ad populum concitandum merito suspecta erat Ezechiæ, aut non ex dignitate aut temporibus conveniens. Sic Ætolis denuntiarunt Romani, ne quam legationem mitterent, nisi permissu Imperatoris: Perseo ne Romam mitteret, sed ad Licinium: et Jugurthæ legatis edictum [k]intra decem dies Italia excederent, ni regnum et regem deditum venissent. Optimo autem jure rejici possunt, quæ nunc in usu sunt legationes assiduæ, quibus quam non sit opus docet mos antiquus, cui illæ ignoratæ.

Lib. iv. 21. Diog. Laërt. ii. 102. 2 Reg. xviii. 36. Liv. xxxvii. 49. Lib. xxxii. 36. Sallust. *Bell. Jug.* c. 30.

IV. 1 [l]De non violandis legatis difficilior est quæstio, et varie a claris hujus sæculi ingeniis tractata. Videndum autem

jussit in locum, qui a comitatu suo abesset triginta milliaria. Guicciardinus libro XVIII. (pag. 472. *Ed. Genev.* 1645.) Bellaius libro III. (fol. 103. *Edit. Paris.* 1573.)

[l] *De non violandis legatis*] Menander Protector de Justino II. Imperatore: ὁ δὲ παρὰ τὸν κοινὸν τῶν πρεσβευτῶν θεσμὸν, εἶχεν ἐν δεσμοῖς· *Ille Avarorum legatos contra jus legationum in vinculis habuit.* Vide Ern. Cothmannum responso XXXII. num 29. et sequentibus, volumine V. [Non Justinus II. Legatos Avarum, sed Baianus, horum Rex, Justini legatos in vincula conjecit: Excerpt. Legat. Cap. 9. *J. B.*]

Cynethenses, as being those of a wicked race, were every where expelled.

Of the second case, we have an example in Theodorus, who was called the Atheist, and whom Lysimachus would not hear, when he was sent by Ptolemy; and the same happened to others on account of some peculiar odium.

The third case occurs when the cause of the mission is either suspected, as when Rabshakeh was sent to Hezekiah: or is not conformable to the dignity of the receiver, or to the time. So the Romans forbad the Etolians to send any embassy, except by permission of the Emperor; commanded Perseus to send, not to Rome, but to Licinius; and ordered the ambassadors of Jugurtha to quit Italy within ten days, except they came to surrender the king and the kingdom. The embassies which may be with the best right excluded, are those resident embassies which are now common, but which are not necessary; as we learn from ancient custom, to which they were unknown.

IV. 1 The question of the inviolability of ambassadors is more difficult, and variously treated by the able men of our time. We must first consider the persons of the ambassadors, and then their suite and property.

habemus de legatorum personis, deinde de comitibus eorum ac bonis. De personis alii ita sentiunt, jure gentium vim duntaxat injustam a legatorum corporibus arceri: censent enim privilegia ex jure communi interpretanda. Alii non omnibus de causis putant legato vim inferri posse, sed ita demum si jus gentium ab eo læsum sit, quod satis late patet: nam in jure gentium jus naturæ includitur, ita ut ex omnibus delictis puniri jam legatus possit, nisi quæ ex mero jure civili oriuntur. Restringunt hoc alii ad ea, quæ contra statum reipublicæ, aut dignitatem ejus, ad quem legatus mittitur, fiunt: quod ipsum sunt qui periculosum putant, et querelas exponendas ei qui misit, ejusque arbitrio permittendum legatum. Sunt et qui putant consulendos reges aut gentes quarum nihil interest: quod prudentiæ esse potest, juris non potest.

2 Rationes quas pro se quisque afferunt nihil definite concludunt: quia jus hoc non ut jus naturale ex certis rationibus certo oritur, sed ex voluntate gentium modum accipit. Potuerunt autem gentes, aut omnino cavere legatis, aut cum certis

[2] Immo ex isto loco contrarium inferri potest; ut ostendimus in Notis nostris Gallicis; ubi et quæ ad jus istud Legationis pertinent, accuratius exponuntur, ex principiis, non fictitii illius Gentium Juris voluntarii, sed ipsius Juris Naturalis. Ceterum longe fusius totum argumentum, etiam in eo quod ad merum usum Gentium refertur, a nobis postea excussum est in Notis Gallicis

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With regard to the persons of ambassadors, some are of opinion that they are protected only from unjust violence: for that their privileges are to be interpreted by common Law. Others think that force may be put upon an ambassador, not for any cause, but only if he violate the Law of Nations; which is a very wide expression; for in the Law of Nations, Natural Law is included: and so, according to this, an ambassador might be punished for any offense, except those which arise from mere Civil Law. Others restrict this to what is done against the state or dignity of the commonwealth to which the ambassador is sent: and others think that even this is dangerous, and that complaints against the ambassador are to be transmitted to him who sent him, and that he is to be left to be judged by him. Some, again, think that kings and nations who are not interested in the question, should be consulted; which may be a matter of prudence, but cannot be a matter of right.

2 The reasons which each of these parties adduce do not conclude anything definitely; because this Law of Nations is not like Natural Law, which flows in a sure way from certain reasons; but this takes its measure from the will of nations. For nations might either altogether refuse to entertain ambassadors, or with certain exceptions.

exceptionibus: nam et hinc utilitas stat pœnæ in gravia delinquentes, et inde utilitas legationum, quarum mittendarum facilitas securitate quanta potest esse maxima optime promovetur. Spectandum ergo quo usque gentes consenserint: quod ex solis exemplis evinci non potest. Exstant enim satis multa in partem utramque. Recurrendum igitur tum ad sapientum judicia, tum ad conjecturas.

3 Judicia duo habeo maxime illustria, Livii alterum, alterum Sallustii. Livii hoc est de legatis Tarquinii, qui proditionem concitaverant Romæ: *Quanquam visi sunt commisisse,* Lib. ii. 4.
ut hostium loco essent, jus tamen gentium valuit. Videmus hic [2]etiam ad eos qui hostilia patrant jus gentium extendi. Sallustii dictum ad comites legationis, de quibus mox dicemus, non ad legatos ipsos pertinet: sed recte a majori, id est, minus credibili, ad minus, id est, magis credibile, procedet argumentatio. Is ita ait: *Fit reus magis ex æquo bonoque, quam* Bell. Jug. c. 39.
ex jure gentium, [3]Bomilcar comes ejus, qui Romam fide publica venerat. Bonum et æquum, id est, merum naturæ

ad Versionem Libri Ampl. Bynkershoeckii *De Foro Legatorum,* cujus secunda Editio prodiit Anno 1730. *J. B.*

[3] Locus iste male quoque huc trahitur, ut patet vel ex Interpretibus, qui verum ejus sensum dudum exposuerunt. *J. B.*

For on the one side stands the utility of punishment against grave delinquents, [even if they be ambassadors,] and on the other, the utility of ambassadors, the sending of whom is facilitated by their having all possible security. We must consider, therefore, how far nations have agreed; and this cannot be proved by examples alone. For there are many each way. We must recur therefore to the judgments of good authorities and to conjectures, that is, probable arguments.

3 There are two judgments of great note, that of Livy, and that of Sallust. Livy's is about Tarquin's ambassadors, who stirred up a treasonable design at Rome: *Though they had behaved so that they might have been treated as enemies, the Law of Nations prevailed:* here we see that the Law of Nations is extended even to those who act as enemies. The dictum of Sallust pertains to the subordinate members of the legation, of whom we shall have hereafter to speak, not to the ambassador: but the argument proceeds rightly, from the greater, that is, the less credible, to the less, that is, the more credible. He says thus: *Bomilcar, his companion, who had come to Rome on the public faith, is put under accusation, rather on the ground of equity, than of the Law of Nations.* Equity, that is, mere Natural Law, allows pen-

jus patitur pœnas exigi, ubi reperitur qui deliquit: at jus gentium legatos et qui his similes fide publica veniunt excipit. Quare ut rei fiant legati contra jus est gentium, quo vetari multa solent quæ jus naturæ permittit.

4 Conjectura quoque hinc stat. Verius enim est privilegia ita intelligenda, ut aliquid tribuant ultra jus commune. Quod si legati ab injusta tantum vi tuti essent, nihil in eo magni esset, [4]nihil præcipui. Adde quod securitas legatorum utilitati, quæ ex pœna est, præponderat. Nam pœna haberi potest per eum qui legatum misit volentem: et si nolit, ab ipso exigi bello, tanquam criminis approbatore. Objiciunt aliqui satius unum plecti, quam bello multos involvi; atqui si is qui legatum misit factum ejus probet, legati pœna bello nos non eximet. Parte vero altera valde in lubrico locatur salus legatorum, si actuum suorum rationem alii reddere debeant, quam a quo mittantur. Nam cum plerumque diversa, sæpe et adversa sint consilia eorum qui mittunt legatos, et qui accipiunt, vix est ut non semper aliquid in legatum dici possit, quod

[4] Abunde sufficit, si non ob quævis delicta jure suo excidat Legatus. *J. B.*

[m] *Aut e finibus jubendus excedere legatus*] Fecit id Stephanus Poloniæ rex Moscis. Thuanus, libro LXXIII. in anno cIↃ IↃ LXXXI. Elisabetha Scoto, et Hispano. Utrumque habes apud Camdenum in an. cIↃ IↃ LXXI. et cIↃ IↃ LXXXIV. [Quod Auctor heic in contextu, quasi ex Polybio, refert, nullibi apud hunc Auctorem reperio. Et videtur omnino deceptus ab Alberico Gentil.

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alties to be demanded when the delinquent can be got hold of; but the Law of Nations makes an exception in favour of ambassadors and those who come under the public faith. Hence to put ambassadors under accusation is contrary to the Law of Nations, which forbids many things which Natural Law permits.

4 Conjecture also is on this side. For it is the sounder opinion that privileges are so to be understood, that they give something beyond common rights. But if ambassadors were only protected from unjust violence, there would be in that nothing great, nothing distinguished. Add that the security of the ambassadors may preponderate over the utility which involves a penalty. For punishment may be had through his means who sent the ambassador; and if he will not afford it, may be demanded by war of him as the approver of the crime. Others object that it is better that one should be punished than many involved in war: but if he who sent the ambassador approve of what he did, his punishment will not save us from war.

On the other side, the safety of ambassadors is in a very insecure position, if they have to render account of their acts to other persons than him who sent them. For since the views of those

criminis accipiat speciem. Et quanquam quædam sunt ita manifesta, ut dubitationem non habeant, sufficit tamen ad æquitatem et utilitatem legis universalis periculum universale.

5 Quare omnino ita censeo, placuisse gentibus ut communis mos, qui quemvis in alieno territorio existentem ejus loci territorio subjicit, exceptionem pateretur in legatis, ut qui sicut fictione quadam habentur pro personis mittentium (*senatus faciem secum attulerat, auctoritatem reipublicæ*, ait de legato quodam M. Tullius) ita etiam fictione simili constituerentur quasi extra territorium; unde et civili jure populi apud quem vivunt non tenentur. Quare si tale sit delictum quod contemni posse videatur, aut dissimulandum erit, [m]aut e finibus jubendus excedere legatus, quod Polybius ei factum narrat qui Romæ obsidibus fugiendi causam præbuerat. Unde obiter datur intelligi, quod alio tempore legatus Tarentinorum, qui idem deliquerat, virgis cæsus est, id eo evenisse, [n]quod Tarentini victi sub Romanis esse cœpissent. Si crimen sit atrocius, et ad publicum malum spectans, [o]remittendus erit legatus

Phil. viii. 8.

De Legat. II. 21. qui ait: *ut in Selectis habet Polybius.* Ibi autem certe nihil tale. *J. B.*]

[n] *Quod Tarentini victi sub Romanis esse cœpissent*] Sic Carolus V. legato ducis Mediolanensis, ut subditi sui, imperavit ne a comitatu suo abscederet. Guicciardinus (libro XVIII. pag. 472) indicato jam loco.

[o] *Mittendus erit legatus ad eum qui misit*] Dion in excerptis legationum: ὅτι νεανίσκοι τινὲς Καρχηδονίων πρέσ-

who send the ambassador and those who receive him are generally diverse, often contrary, it is scarcely possible that something may not be said against the ambassador which may take the form of an accusation. And though some things of this kind are so manifest that they admit of no doubt, the universal danger suffices to establish the equity and utility of the universal rule.

5 Wherefore I quite think thus: that the common rule, that he who is in a foreign territory is subject to that territory, does, by the common consent of nations, suffer an exception in the case of ambassadors; as being, by a certain fiction, in the place of those who send them: [see Cicero:] and by a similar fiction they are, as it were, *extra territorium;* and thus, are not bound by the Civil Law of the People among whom they live. Hence, if there be any delict which can be treated lightly, either it is to be overlooked, or the ambassador ordered beyond the borders, as Polybius relates was done to him who at Rome had aided the escape of the hostages. On which occasion, in passing, we are given to understand that at another time, the ambassador of the Tarentines, who had committed the same offense, was scourged; but that was done, because the Tarentines had begun

ad eum qui misit, cum postulato ut eum puniat aut dedat,
Liv. v. 36. quomodo Gallos postulasse legimus, ut sibi dederentur Fabii.

6 Sed, quod supra diximus aliquoties, humana jura omnia ita esse comparata, ut non obligent in summa necessitate, id de hoc quoque præcepto sanctimoniæ legatorum obtinebit. Verum is apex necessitatis non est in sumtione pœnæ, quam et aliis in casibus tolli jure gentium infra apparebit, cum de solennis belli effectibus agemus: multo minus in loco, tempore, ac modo sumendæ pœnæ, sed in præcautione gravis mali, præsertim publici. Quare ut obviam eatur imminenti periculo, si alia nulla est ratio idonea, et retineri et interrogari legati poterunt. Ita consules Romani Tarquinii [p]legatos deprehenderunt, [q]literarum in primis habita cura, ut Livius loquitur, ne interciderent.

βεις εἰς τὴν Ῥώμην ἐλθόντες, ὑβρίσαντες, ἐπέμφθησαν μὲν εἰς τὴν Καρχηδόνα, καὶ ἐξεδόθησαν σφίσιν, οὐκ ἔπαθον δὲ ὑπ' αὐτῶν δεινὸν οὐδὲν, ἀλλ' ἀφείθησαν· Cum juvenes quidam legati a Carthagine Romam venissent, ibique contumeliose quædam fecissent, missi sunt Carthaginem, traditique Carthaginiensibus, ab his vero nihil illis nocitum est, sed dimissi sunt incolumes. [Exc. Fulv. Ursin. num. 18. ubi ex incogitantia Auctor noster postrema verba male vertit, pro: *Traditique illis*, scilicet, *Romanis*, non *Carthaginiensibus*, a quibus contra legati dediti sunt. *J. B.*]

p *Legatos deprehenderunt*] Pelopidas in vincula conjectus ab Alexandro Pheræo, quod, legatus cum esset, Thessalos ad libertatem concitaret. Plutarchus, (pag. 292) et Latinus scriptor vitæ Pelopidæ. (Corn. Nep. c. 5.)

q *Literarum in primis habita cura*] Vide Serranum in Henrico IV. [Aut potius Auctorem Supplementi Monliardum, pag. 844. *Edit. Francof.* 1627. qua usus videtur Auctor. Neque enim Serranus ultra regnum Caroli VII. processit. Ceterum agitur ibi de eo, qui a Secretis erat Legato Hispaniæ, propter proditionem, simul cum Maerargo, in custodiam dato. *J. B.*]

5 Chorus est, qui loquitur heic, non Fecialis, vers. 272. Quamquam et in Excerptis ex Trag. et Comic. Græcis, Auctor, nescio quare, id Feciali tribuat. *J. B.*

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to be subject to the Romans. If the crime be more atrocious, and tending to public mischief, the ambassador must be sent back to him who sent him, with a demand that he be punished or surrendered; as the Gauls asked that the Fabii should be given up to them.

6 But, as we have said above, that all human rights are so conditioned, that they do not bind in cases of extreme necessity, so is this true in this doctrine of the inviolability of ambassadors. But that extreme of necessity does not occur in the requirement of punishment; which may also be suspended in other cases by the Law of Nations; as will appear below, where we treat of the established effects of war: still less does this necessity operate in the place, time, and manner of taking punishment; but it does hold in precautions against graver

7 Quod si vim armatam intentet legatus, sane occidi poterit, non per modum pœnæ, sed per modum naturalis defensionis. Sic Fabios, quos violatores juris humani Livius vocat, Galli occidere potuerunt. Itaque apud Euripidem Heraclidis Demophon fecialem ab Eurystheo missum et vi supplices abripere conantem vi prohibuit, et cum ille 5 diceret: Lib. v. 36.

Tun' fecialem cædere huc missum audeas?

Respondet,

Ni fecialis dexteram a vi temperet.

Huic feciali nomen fuisse [r] Copreo, [s] et quia vi ageret a populo Atheniensi interfectum, narrat Philostratus vita Herodis. Distinctione non dissimili solvit Cicero quæsitum illud, an patrem patriæ proditorem filius accusare debeat. Vult enim debere ad *Vit. Soph.* ii. 5. *Offic.* iii. 23.

[r] *Copreo*] Vide *Iliados* O. (vers. 639.)

[s] *Et quia vi ageret*] Sic interpretandum, quod Theodahatus Gotthus Justiniani legatis dicit apud Procopium *Gotthicorum* I. (cap. 7.) *σεμνὸν μὲν τὸ χρῆμα τῶν πρέσβεων καὶ ἄλλως ἔντιμον καθέστηκεν εἰς πάντας ἀνθρώπους. τοῦτο δὲ τὸ γέρας εἰς τόδε οἱ πρέσβεις ἐν σφίσιν αὐτοῖς διασώζουσιν, ἐσότου σφετέρᾳ ἐπιεικείᾳ φυλάξωσι τὸ τῆς πρεσβείας ἀξίωμα. κτεῖναι γὰρ ἄνδρα πρεσβευτὴν ἐνδίκως νενομίκασιν ἄνθρωποι, ὅταν ἢ εἰς βασιλέα ὑβρίσας φαίνεται, ἢ γυναικὸς ἄλλῳ ξυνοικούσης εἰς εὐνὴν ἔλθοι·* *Sanctum apud homines legatorum nomen, plenumque honoris. Sed hoc jus legati sibi tamdiu servant, quamdiu sua modestia legationis dignitatem tuentur. Ita enim existimant homines, fas esse vel interficere legatum, si is in principem ad quem mittitur sit injuriosus, aut alienum matrimonium violet.* Legati vero, cum ostendissent longissime se abesse ab adulterii suspicione, quorum ne exitus quidem sine custode essent, addunt prudenter: Τοὺς λόγους δὲ ὅσους ἂν ἐκ τοῦ πέμψαντος ἀκηκόως εἴπῃ, οὐκ αὐτὸς τὴν ἐντεῦθεν αἰτίαν, ἤνγε οὐκ ἀγαθοὶ τύχωσιν ὄντες, εἰκότως ἂν λάβοι. ἀλλ' ὁ μὲν κελεύσας φέροιτο δικαίως τὸ ἔγκλημα τοῦτο. τῷ δὲ πρεσβευτῇ τὸ τὴν ὑπουργίαν ἐκτελέσαι περίεστι μόνον· *Si legatus ea dixerit quæ audivit a principe qui ipsum misit, ea si non sint commoda, præstare*

evil, especially public. Wherefore in order to obviate imminent danger, if there be no other effectual course, ambassadors may both be detained and interrogated. Thus the consuls of Rome apprehended the ambassadors of Tarquin, looking first to the letters which they carried, as Livy says, that *they* might not escape them.

7 If the ambassador use armed force, he may undoubtedly be killed, not in the way of punishment, but in the way of natural defense. Thus the Fabii, whom Livy calls the violators of human law, might be killed by the Gauls. So in Euripides, Demophon threatens the Herald. The name of this Herald was Copreus, and because he used violence, he was put to death by the Athenians, as Philostratus relates. Cicero solves, by a not dissimilar distinction, the question, whether a son ought to accuse a father who is betraying his

avertendum periculum imminens, non autem vitato jam periculo in facti pœnam.

V. 1 Ea vero quam dixi lex, de vi legatis non inferenda, intelligenda est eum obligare ad quem missa est legatio, atque ita demum si admisit, quasi scilicet ab eo tempore tacita pactio intercesserit. Ceterum denuntiari et potest et solet, ne mit-
Liv. xxxvii. 49. tantur legati; alioqui pro hostibus fore: ut Ætolis a Romanis
Idem iv. 58. est denuntiatum, et olim a Romanis Veientibus edictum ni facesserent urbe, daturos quod Lars Tolumnius dedisset: et
Liv. x. 12. Romanis a Samnitibus, si quod adiissent in Samnio concilium, haud inviolatos abituros. Non pertinet ergo hæc lex ad eos per quorum fines, non accepta venia, transeunt legati: nam [t]siquidem ad hostes eorum eunt, aut ab hostibus veniunt, aut
Thuc. ii. 67. alioqui hostilia moliuntur, interfici etiam poterunt, quod Athe-

non ipse debet culpam, sed qui eum misit: ipsi quippe nihil aliud concessum est quam ministerio mandato fungi. Vide et Camdenum indicato jam loco anni cIↃ IↃ LXXI.

t *Siquidem ad hostes eorum eunt, aut ab hostibus veniunt*] Siculi Atheniensium socii legatos Syracusanorum missos ad civitates alias cepere; Thucydides, Lib. VII. (c. 32.) Sic et Argivi cepere legatos Athenis a factione paucorum missos et Argos perduxere. Idem Thucydides libro VIII. c. 86. Legatos Ætolorum ad Romanos intercepere et pretium eis extorsere Epirotæ: horum unus literis Romanorum liberatus. Polybius in excerptis legationum num. 27. De Gallorum ad Turcam legatis quos in Pado Hispani cepere et occiderunt, vide judicia Parutæ libro XI. Bizari libro XXI. de Flandriæ civitatum legatis ad Gallum captis a Maximiliano, Crantzium *Saxonicorum* XII. 23. Laudatur Belisarii clementia, quod Gelimeris legatis in

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country. For he decides that he may do so, to avert the imminent danger, but not to invoke punishment when the danger is past.

V. 1 But the law which I have stated, of the inviolability of ambassadors, is to be understood to bind him to whom the embassy is sent; and more particularly if he has received the ambassador, as if from that time a tacit compact had been introduced. But prohibitions may be and are often delivered, that ambassadors are not to be sent; and that if sent, they will be treated as enemies: as notice was given to the Ætolians by the Romans; and as it was in old times announced by the Romans to the Veians, that except they quitted the city, they would be treated as Lars Tolumnius had treated their ambassadors; [who put them to death :] and as was announced to the Romans by the Samnites, that if they presented themselves at any public meeting in Samnium, they would not depart inviolate. This law does not affect those through whose territory the ambassadors pass without having received permission: for in so far as they go to their enemies, or come from their enemies, or in any other way appear as enemies, they may be put to death. As the Athenians dealt with the

nienses fecerunt legatis inter Persas et Spartanos, Illyrii legatis inter Essios et Romanos: multoque magis vinciri, quod constituit Xenophon in quosdam, Alexander in eos, qui Thebis et Lacedæmone ad Darium missi erant, Romani in legatos [u]Philippi ad Annibalem, et Latini in legatos Volscorum.

App. *de Bell. Ill.* p. 760. Lib. VI. *de Exp. Cyri*, c. 3. § 7. Ar. II. 15. Liv. XXIII. 33. Dion. Halic. vi. 25.

2 Tale si nihil sit, et male tractentur legati, [x]non illud jus gentium, de quo agimus, sed amicitia et dignitas aut ejus qui misit, aut ejus ad quem eunt, violata censebitur. Justinus de Philippo posteriore Macedonum rege: *Legatum deinde ad Annibalem jungendæ societatis gratia cum epistolis mittit: qui comprehensus et ad senatum* (Romanum) *perductus incolumis dimissus est, non in honorem regis, sed ne, dubius adhuc, indubitatus hostis redderetur.* Lib. xxix. 4.

VI. Ceterum admissa legatio [y]etiam apud hostes, tanto

Hispaniam missis et ab Hispania reversis Carthaginem, quæ jam facta erat Romanorum, pepercerit. Procopius *Vandalicorum* I. [c. 24. Secundum exemplum, e Thucydide petitum, non accurate refertur. Legati enim per proditionem traditi fuere Argivis a Paraliis. *J. B.*]

[u] *Philippi ad Annibalem*] Vide Appianum in excerptis legationum num. 19.

[x] *Non illud jus gentium de quo agimus*] Aliud sit si quis extra fines suos insidias ponat legatis alienis: eo enim jus gentium violaretur. Et hoc continetur in Thessalorum oratione contra Philippum, apud Livium, (XXXIX. 25.)

[y] *Etiam apud hostes*] Vide loca modo producta ad § 1. Donatus ad illud Eunuchi: CONVENIRE ET COLLOQUI. *Sic pronunciandum est, ut quasi dicat, liceat per te, miles, quod etiam inter hostes et in bello licet.* (In Act. III. scen. 2, vers. 14.)

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ambassadors between the Persians and Thebans, and the Illyrians with those between the Essii* and the Romans: and much more may they be thrown into bonds, as Xenophon did to certain persons, and Alexander to those who were sent from Thebes and Lacedæmon to Darius, and the Romans to the ambassadors of Philip to Annibal, and the Latins to those of the Volsci.

2 If there be no such cause, and ambassadors [passing through the territory] are ill treated, it is not the Law of Nations, of which we are speaking, which is violated, but the friendship and dignity either of him who sent them, or of him to whom they go, which is conceived to be violated. Justin says of the letter of Philip, king of Macedon, that his ambassador to Annibal being carried to Rome, he was dismissed in safety by the Senate, not out of honour to the king, but in order that he, as yet doubtful, might not be made an indubitable enemy.

VI. But the embassy, once admitted, has, even with enemies, and much more with a party merely unfriendly, the protection of the Law

* The inhabitants of Issa, an island on the coast of Illyria. *Gronov.*

magis apud inimicos, præsidium habet juris gentium. Caducéatoribus in bello pacem esse dixit Diodorus Siculus. Lacedæmonii, qui Persarum feciales interfecerant, eo dicuntur *συγχέαι τὰ πάντων ἀνθρώπων νόμιμα, confudisse omnium hominum jura. Si quis legatum hostium pulsasset, contra jus gentium id commissum esse existimatur, quia sancti habentur legati,* inquit Pomponius. Et Tacitus hoc jus de quo agimus vocat, *hostium jus et sacra legationis et fas gentium.* Cicero prima Verrina: *Nonne legati inter hostes incolumes esse debent?* Seneca *de Ira: Violavit legationes rupto gentium jure.* Livio cædes ruptura jus gentium, scelus, causa nefanda, cædes impia dicitur, in historia legatorum, quos Fidenates occiderant. Et alibi: *Legatis in periculum adductis ne belli quidem jura relicta erant.* Curtius: *Caduceatores qui ad pacem eos compellerent misit, quos Tyrii contra jus gentium occisos præcipitaverunt in altum.* Merito sane: nam et in bello plurima incidunt negotia, quæ nisi per legatos transigi non possunt, et ipsa pax vix est ut aliter coëat.

[Margin notes: Lib. v. 75. — Herod. vii. 137. — L. vii. D. de Legat. — *Ann.* i. 42. — Cap. 33. — Lib. iii. 2. — Lib. iv. 17. — *Ibid.* c. 32. — Lib. xxiv. 33. — Lib. iv. 2.]

VII. Solet et illud quæri, an jure talionis interfici, aut male tractari legatus possit ab eo veniens qui tale quid patraverit. Et sunt quidem ultionis talis exempla in historiis satis

[z] *Nihil tale quale factum esset a Carthaginiensibus*] Diodorus Siculus in excerptis Peirescianis: Σκιπίων οὐκ ἔφη δεῖν πράττειν ὃ τοῖς Καρχηδονίοις ἐγκαλοῦσιν. *Dixit Scipio, non esse id faciendum quod ipsi in Carthaginiensibus accusarent.* (Pag. 290.) et Romani ipsi legatos, jam comperto Carthaginiensium facto, dimiserunt. Vide Appianum. Constantius Titianum a

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of Nations. Heralds and negociators are at peace in the middle of war, says Diodorus. The Lacedæmonians who put to death the ambassadors of the Persians, are said thereby to have *thrown into confusion the rights of mankind.* So Pomponius, Tacitus, Cicero, Seneca, Livy, Curtius. [See the passages.] And with great reason; for in war many things happen which cannot be transacted except by ambassadors; and peace itself can scarcely be attained in any other way.

VII. It is also made a question whether by the law of retaliation, an ambassador may be put to death or ill treated, who comes from a person who has perpetrated something of that kind. And certainly there are in histories many examples of such revenge. But histories relate not only what was rightly done, but what wrongly, angrily, passionately. The Law of Nations not only provides for the dignity of the Sender, but for the security of the Sent; and therefore there is a contract with the latter also. Wrong, therefore, is in such case done to him, though none be done to him who sent him.

multa: sed nimirum historiæ non tantum quæ juste, sed et quæ inique, iracunde, impotenter facta sunt memorant. Jus gentium non tantum mittentis cavet dignitati, sed et ejus qui mittitur securitati; quare cum hoc quoque tacite contrahitur. Huic ergo fit injuria, etiam si ei qui misit nulla fiat. Non igitur magnanime tantum, sed et ex jure gentium Scipio, qui postquam legati Romanorum a Carthaginiensibus male essent habiti, ductis ad se Carthaginiensium legatis, et quid fieri deberet interrogatus respondit, *nihil tale quale factum esset a Carthaginiensibus. Addit Livius dixisse eum, nihil se facturum institutis populi Romani indignum. Valerius Maximus consulibus Romanis in facto simili, sed antiquiore hanc tribuit vocem: *Isto te metu, Hanno, fides civitatis nostræ liberat.* Nam tunc quoque Cornelio Asinæ, contra jus legationis, injectæ a Pœnis catenæ fuerant.

App. *de Bell. Pun.* p. 19.

Lib. xxx. 25.

Lib. vi. 6. n. 2.

VIII. 1 Comites quoque et vasa legatorum sui generis sanctimoniam habent, unde in antiquo fecialium carmine erat: *Rex, facisne me tu regium nuntium populi Romani Quiritium? vasa comitesque meos?* Et lege Julia de vi publica teneri pronuntiantur non modo qui legatos, sed et qui comites eorum injuria affecerunt. Sed hæc [a]sancta sunt accessorie, et

Liv. i. 24.

L. Leg. Jul. 7. *D. ad l. Jul. de vi publ.*

Magnentio ad se missum remisit, quanquam Philippum a Constantio missum ad se retinebat Magnentius. Zosimus, libro II. (cap. 49. *Ed. Cellar.*) Vide et historias apud Cromerum libris XIX. et XXI. et Parutam, de legatis Venetis in itinere in Galliam retentis, Lib. VII.

[a] *Sancta sunt accessorie, et proinde quatenus legato videtur*] Vide Fraxini Canæi epistolas, paginis 75 et 279.

Therefore it was not only magnanimously done of Scipio, but also according to the Laws of Nations, when, after the ambassadors of the Romans had been illtreated by the Carthaginians, he had the Carthaginian ambassadors brought before him, and being asked, What was to be done with them, answered, Nothing like what the Carthaginians had done. Livy adds, that he said that he would do nothing unworthy of the institutions of Rome. Valerius Maximus, in a similar but more ancient fact, ascribes to the Consuls this saying, *From such fear, Hanno, the faith of our city liberates you:* for there also Cornelius Asina, contrary to the rights of legation, had been thrown into chains by the Carthaginians.

VIII. 1 The suite and the furniture of the ambassadors have also their own sacredness; and so the ancient formula of the Feciales ran: *King, do you make me the royal messenger of the Roman People, with my company and equipments?* And by the Julian Law, those are held to be guilty of unlawful violence who have done injury, not only to

proinde quatenus legato videtur. Itaque si quid comites gravius deliquerint, postulari a legato poterit ut eos dedat. [b] Vi enim abstrahendi non sunt: quod cum factum esset ab Achæis in Lacedæmonios quosdam, qui cum legatis Romanis erant, [6] vociferati sunt Romani jus gentium lædi: quo referri etiam potest Sallustii judicium de Bomilcare, quo supra usi sumus. Quod si dedere eos nolit legatus, eadem scilicet facienda erunt quæ modo de legato diximus.

Paus. Lib. vii. *seu Ach.* c. 14. p. 556.

2 Ipse autem legatus an jurisdictionem habeat in familiam suam, et [c] an jus asyli in domo sua pro quibusvis eo confugientibus, [7] ex concessione pendet ejus apud quem agit. Istud enim juris gentium non est.

IX. Bona quoque legati mobilia, et quæ proinde habentur personæ accessio, pignoris causa, aut ad solutionem debiti capi non posse, nec per judiciorum ordinem, nec, quod quidam volunt, manu regia, verius est; nam omnis coactio abesse a legato debet, tam quæ res ei necessarias quam quæ personam tangit, quo plena ei sit securitas. Si quid ergo debiti contraxit, et, ut fit, res soli eo loco nullas possideat, ipse com-

[b] *Vi enim abstrahendi non sunt*] Serranus Henrico IV. [Aut potius Auctor Supplementi, eodem loco, quem indicavimus, in § 4. not. q. *J. B.*]

[6] Exemplum istud male refertur et aptatur. Consule locum Pausaniæ, quem in ora libri distinctius indicavimus. *J. B.*

[c] *An jus asyli in domo*] Distingui ferme hac in re solent crimina. Vide

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ambassadors, but also to their companions. But these are sacred, in an accessory manner only, and so far as the ambassador chooses: and the ambassador may be required to give them up. But they are not to be taken by force. When this was done by the Achæans to some Lacedæmonians who were in the company of the Roman ambassadors, the Romans exclaimed loudly that the Law of Nations was violated. To this may be referred the judgment of Sallust concerning Bomilcar, which we have quoted above. But if the ambassador will not give them up, the course is to be taken which we have pointed out in speaking of the ambassador.

2 Whether the ambassador has jurisdiction over his own family and suite, and whether his house is to be an asylum for all who take refuge there, depends on the concession of the party with whom he resides: for it is not a part of the Law of Nations.

IX. Also the moveable property of an ambassador, which is regarded as an appendage to his person, cannot be taken or impounded for debt, neither by order of a court, nor (as some think) by the

pellandus erit amice, et si detrectet, is qui misit, ita ut ad postremum usurpentur ea, quæ adversus debitores extra territorium positos usurpari solent.

X. 1 Nec metuendum est quod quidam putant, ne si id juris sit nemo inveniatur qui cum legato contrahere velit. Nam et regibus qui cogi nequeunt non desunt creditores, et apud quosdam populos moris fuisse docet Nicolaus Damascenus, ut de contractibus qui in creditum iissent jus nullum redderetur, non magis scilicet quam adversus ingratos: ita ut cogerentur homines, aut pariter implere contractum, aut contenti esse nuda fide debitoris. Et optat hunc rerum statum [d] Seneca: *Utinam quidem persuadere possemus, ut pecunias creditas tantum a volentibus acciperent: utinam nulla stipulatio emtorem venditori obligaret: nec pacta conventaque impressis signis custodirentur. Fides potius illa servaret, et æquum colens animus.* Persis quoque Appianus ait displicuisse: [e] *τὸ κιχρᾶσθαι ὡς ἀπατηλόν τε καὶ φιλοψευδές, pecuniam creditam sumere, ut quæ res fraudibus et mendaciis esset obnoxia.*

Exc. Peir. p. 522. e Stob. Serm. 44.

Civil. 1. p. 332.

Parutam libro x. ubi rex Galliæ hanc ob causam iratus pacatur. Vide eundem libro IX.

[7] Vide Celeberrimi THOMASII Dissertationem *De jure azyli, Legatorum ædibus competente,* quæ inter Lipsienses XVI. numero est. *J. B.*

[d] *Seneca*] *De Beneficiis,* III. 15.

[e] Τὸ *κιχρᾶσθαι*] Τὸ *ὀφείλειν χρέος* pro eodem dixit Herodotus *Clio,* (seu Lib. I. c. 138.)

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royal hand. For all compulsion ought to be removed from an ambassador; that which touches things necessary to him, as well as his person, that he may have full security. Therefore, if he have contracted any debt, and, as may easily happen, has no real property in that country, he is to be asked for it in a friendly way; and if he refuse, he who sent him is to be applied to: and at last, he may be proceeded against in the manner of debtors who are without the territory.

X. 1 Nor is it to be feared, as some think, that on such terms no one will contract with an ambassador. For kings also, who cannot be compelled, do not fail to find creditors: and in some peoples it has been the custom, that he who had given credit on a contract should not have a sentence in his favour by a court: any more than if he brought an action for ingratitude; so that men would be compelled either to receive ready money, or to trust to the naked good faith of the debtor. Seneca expresses a wish for such a state of things. So Appian says this was the Persian practice.

Var. Hist. iv. 1. 2 De Indis idem narrat Ælianus: cui consentit Strabo his verbis: Δίκην δὲ μὴ εἶναι πλὴν φόνου καὶ ὕβρεως. οὐκ ἐπ' αὐτοῦ γὰρ τὸ μὴ παθεῖν ταῦτα. τὰ δ' ἐν τοῖς συμβολαίοις ἐπ' αὐτῷ ἑκάστῳ· ὥς τε ἀνέχεσθαι δεῖ, ἐάν τις παραβῇ τὴν πίστιν. ἀλλὰ καὶ προσέχειν ὅτῳ πιστευτέον, καὶ μὴ δικῶν πληροῦν τὴν πόλιν· *Judicia non esse nisi de cæde et injuria: quia homo præstare non possit ne in ea incidat: at contractus in cujusque esse potestate: ideo ferendum si quis fidem violet: et ante videndum cui quisque credat, non autem litibus implendam civitatem.* A Charonda quoque constitutum fuit, ne quis actionem haberet qui de pretio habuisset fidem: quod et [f]Platoni placuit. Notatum et Aristoteli: παρ' ἐνίοις δὲ τούτων οὐκ εἰσὶ δίκαι, ἀλλ' οἴονται δεῖν στέργειν κατὰ πίστιν συναλλάξαντας· *apud quosdam de his rebus judicia non sunt: existimant enim homines contentos esse debere fide quam sunt secuti.* Et alibi: ἐνιαχοῦ τ' εἰσὶν νόμοι, τῶν ἑκουσίων συμβολαίων δίκας μὴ εἶναι, ὡς δέον ᾧ ἐπίστευσε διαλυθῆναι πρὸς τοῦτον καθάπερ ἐκοινώνησεν· *Est ubi leges de [g]credito jus reddi vetant, quasi privatim tantum cum eo agendum sit, cum quo quis contraxit, et cujus fidem secutus est.* Quæ contra hanc sententiam adferuntur ex jure Romano, non ad nostros legatos, sed ad provinciales aut municipales pertinent.

(Lib. xv. p. 709. — Stob. de Leg. Tit. 44. — Ethic. Nic. viii. 15. — Ibid. ix. 1.)

XI. Bellorum, quæ ob male habitos legatos suscepta sunt, plenæ sunt [g]profanæ historiæ. Exstat et [h]in sacris

[f] *Platoni*] VIII. *de Legibus,* (pag. 849, 850. Tom. II. *Ed. H. Steph.*)

[g] Vertendum erat, *de contractibus voluntariis,* ut Græca sonant. Ceteroquin vide quæ diximus ad PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. v. cap. ii. § 3. not. 1. *J. B.*

[g] *Profanæ historiæ*] Romani ob id bellum suscepere in Senonas. Appianus excerpto legationum 4 et 10. In Illyrios et Ligures. Polybius excerpto legationum 125 et 134. In Issios. Dion, exc. legationum II. In Corinthios. Livius, libro LII. Epitom. In Tarentinos. Dionysius Halicarnassensis excerpto legationum 4. (p. 709, 710. *Ed. Oxon.*) Francorum et Germanorum exempla habes apud Aimoinum, libro III. cap. lxi.

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2 Elian relates the same thing of the Indians. Charondas made the like rule; and Plato approves. Aristotle remarks the same. [See.] The arguments against this from the Roman Law do not pertain to ambassadors such as we speak of, but to representatives of provinces and towns.

XI. Wars engaged in on account of ambassadors being ill used, are found in all parts of profane history. Also Scripture mentions

libris memoria belli quod eo nomine David gessit adversus 2 *Sam.* x.
Ammonitas. Nec aliam causam justiorem existimat Cicero *Pro Leg. Man.* c. 5.
adversus Mithridatem.

et lxxxviii. et Withikindum libro II.

[h] *In sacris libris*] Vide Chrysostomum *ad Stagirium* libro III. (Tom. VI. pag. 129.)

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the war which, on this account, David undertook against the Ammonites. Cicero says, there is no juster cause of war.

CAPUT XIX.

DE JURE SEPULTURÆ.

I. *Ex eodem jure gentium nasci jus humandi mortuos.*
II. *Unde ortum?*
III. *Deberi et hostibus.*
IV. *An et insigniter facinorosis?*
V. *An et his, qui se interfecerint?*
VI. *Quæ alia ex jure gentium debeantur.*

I. 1 EX jure gentium, [1]quod ex voluntate ortum habet, debetur et corporum mortuorum sepultura. Dion Chrysostomus inter mores, sive ἔθη, quæ τοῖς ἐγγράφοις, id est, *scripto juri*, opponit, post legatorum jura commemorat μὴ κωλύειν τοὺς νεκροὺς θάπτειν, *non prohibere quominus sepeliantur mortui.* Et Seneca pater inter jura non scripta, sed omnibus scriptis certiora ponit humum porrigere cadaveri. Naturæ id jus appellant Hebræi Philo ac Josephus; et φύσεως θεσμοὺς, Isidorus Pelusiota: ut solere sub naturæ nomine comprehendi mores communes naturali rationi consentaneos alibi diximus. Apud Ælianum est: τῆς φύσεως τῆς κοινῆς ἀπαιτούσης τὸν μηκέτι ζῶντα κατακρύψαι· *cum mortuum condi ipsa imperet communis natura.* Idem alibi: τὰ κοινὰ καὶ ἴσα πᾶσιν ἀνθρώποις vocat γῆν καὶ ταφὴν, *terram ac sepulturam hominibus cunctis communia et ex æquo debita.* [a]Leges hominum, νόμους βροτῶν dixit Euripides *Supplicibus*, κοινὸν νόμον Aristides, Lucanus hominum ritus, terrarum leges et mundi federa Papinius, sortis humanæ commercium Tacitus, spem communem orator Lysias. Qui impedit, ho-

Περὶ ἔθους. *Orat.* 76. p. 649 c.

Lib. i. contr. 1.

Jud. Bell. iv. 6. § 3.

Epist. ult. Edit. 491.

Lib. xii. 64.

Lib. xiii. 30.

Ver. 378.

Panath. Tom. I. p. 202 B.

Phars. vii. 801.

Theb. xii. 642.

Ann. vi. 19.

Orat. Funeb. seu xxxi. 3.

[1] Jus istud *Sepulturæ* a Lege Naturali quoque oritur. Vide quæ diximus ad PUFENDORF. *De Jure Nat. et Gent.* Lib. II. cap. 3. § 23. not. 9. ultimæ Editionis. *J. B.*

[a] *Leges hominum*] Φύσεως θεσμοὺς,

CHAPTER XIX. *Of the Right of Sepulture.*

I. 1 The Laws of Nations voluntarily instituted, direct also the sepulture of dead bodies. Dio Chrysostom, among the *usages*, which he opposes to *written law*, mentions, after the rights of legation, the usage of not refusing burial to the dead. So Seneca the father, Philo, Josephus, Isidore of Pelusium, who calls this *a law of nature*, the general natural habits of man being included in the term *nature*, as elsewhere noticed. So Euripides, Aristides, Lucan, Papinius [Statius], Tacitus. He who prevents it, puts off humanity, as Claudian says;

minem exuere, Claudiano dicitur; naturæ dedecus facere, Leoni Imperatori: τὴν ὁσίαν ὑβρίζειν, *fas violare*, Isidoro Pelusiotæ.

Bell. Gild. v. 397. *Nov.* liii. *d. loco.*

2 Et quia veteres jura hæc hominibus bene moratis communia, quo sanctiora viderentur, ad Deos referebant auctores, ut legationis, ita et hoc jus Diis adscribi passim videmus. Itaque in dicta tragœdia *Supplicibus* [b] νόμον δαιμόνων Deorum legem dictam invenies, et apud Sophoclem *Antigone* Creonti, qui Polynicem humari vetuerat, ita respondit (vers. 460, et seqq.):

Ver. 563.

Decreta quippe hæc nec supremus Jupiter
Nec fas Deorum Manium dictaverat,
Queis alia jura debet humanum genus,
Nec id valere credidit jussus tuos,
Ut jura non conscripta, sed nutu Deum
Concessa, sempiterna, mortalis satus
Violare posses: non enim nuper vigent,
Sed ævo ab omni: initia in occulto latent.
Nonne ergo forti corde, seposito metu
Mortalis iræ, par Deis magnis fuit
Me gerere morem?

3 Isocrates de bello agens Theseos adversus Creontem ita loquitur: *Quis nescit, quis non didicit, vel in Dionysiis ex tragœdiarum auctoribus, quæ Adrasto mala circa Thebas contigerint, cum reducere volens Œdipodis filium, generum autem suum, Argivorum plurimos perdidit, ipsosque ductores vidit interemtos: ipse vero cum dedecore superstes, cum inducias ad humandos mortuos obtinere non potuisset, supplex Athenas venit, quam tunc civitatem Theseus regebat, cumque oravit ne viros tales insepultos jacere pro nihilo duceret, neve pateretur proculcari antiquum morem, et jus*

Panath. p. 268.

naturæ leges. Eus. *Hist.* VIII. 19. (*De Martyrib. Palæstin.* cap. 9. pag. 425. *Edit. Cantabrig. Vales.* 1720.)

[b] Νόμον δαιμόνων] Sophocles *Ajace* (vers. 1149.) idem θεῶν νόμους dixit in *Antigone.* (vers. 462.)

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disgraces humanity, as Leo; insults decency, as Isidore says.

2 This right, as being common to all civilized men, was referred to the gods as its authors. So in the *Supplices* of Euripides; the *Antigone* of Sophocles. [See.]

3 So Isocrates in several places*, Herodotus, Diodorus, Xenophon, Lysias and Aristides†.

* The passage about the Thebans is wrongly applied. J. B.

† The passage of Aristides in wrongly applied. J. B.

patrium, quo omnes homines inter se utuntur, non quasi ab humana natura condito, sed tamquam imperato a divina potentia: quæ cum ille audiisset, sine mora legationem Thebas decernit. Idem mox [c]Thebanos reprehendit [2]quod civitatis suæ decreta legibus divinis antehabuissent: ejusdemque historiæ et alibi meminit, Panegyrico, Helenæ encomio, Plataica oratione: Herodotus quoque Calliope, Diodorus Siculus historiarum quarto, Xenophon historiæ Græcæ sexto, et Lysias ea quæ est in honorem sepultorum: postremo Aristides in Panathenaico, [3]qui bellum hoc susceptum ait pro communi natura hominum.

Pag. 52. Pag. 214. Pag. 306. Lib. ix. 27. Cap. 67. Cap. 5. § 38. Cap. 3.

4 Et passim apud laudatos auctores videmus egregia virtutum nomina huic officio tribui. Nam humanitatem vocant [4]Cicero et [d]Lactantius, humanitatem ac mansuetudinem Valerius Maximus, misericordiam et religionem Quintilianus, misericordiam et humanitatem Seneca, *οἶκτον τῆς κοινῆς φύσεως miserationem communis naturæ* Philo, sortis humanæ commercium Tacitus, misericordiam et pietatem Ulpianus, Modestinus memoriam humanæ conditionis: clementiam Capitolinus: *δίκην*, sive justitiam Euripides et Lactantius: opus benignum Prudentius. Contra Donatistas, qui Catholicorum corpora se-

Cic. *Orat. pro Quint.* Lact. *Inst.* vi. 12. Val. Max. v. 1. Quint. xii. c. ult. *Inst. Orat.* Sen. *de Benef.* v. 20. *Lib. de Jos.* p. 530 B *Ann.* vi. 19. *L.* 14. § 7. *D. de Rel.* *L.* 27. *ff. de Cond. Inst.* *Capit. in M. Anton. Phil.* c. 13. *Supplic.* vs. 379, 526, 530. Lact. vi. 12. n. 31. *Cath. Hymn.* x. 63.

[c] *Thebanos reprehendit*] Pacto, non prælio, obtentum a Thebanis jus sepeliendi vult Plutarchus *Theseo* (pag. 14.) At prælio Pausanias *Atticis* (c. 39.)

[2] Non: sed ut ostendat, quanta esset auctoritas Atheniensium, observat, eos, qui Thebis plurimum poterant, majorem rationem habuisse illorum postulationis, quam Legum ab ipso Numine latarum, de jure sepulturæ: *Τοὺς δὲ κυρίους ὄντας Θηβῶν οὕτω διαθεῖσαν, ὥσθ' ἐλέσθαι μᾶλλον αὐτοὺς ἐμμεῖναι τοῖς λόγοις ὑπὸ τῆς πόλεως ἐκπεμφθεῖσιν, ἢ τοῖς νόμοις τοῖς ὑπὸ τοῦ Δαιμονίου κατασταθεῖσι·* pag. 269 c. Auctor, dum festinans legeret, nec ad seriem orationis adtenderet, verba, *ὑπὸ τῆς πόλεως*, intellexit de Thebis; quum de Athenis agatur. *J. B.*

[3] Locus est pag. 204 A. Tom. I. *Ed. Paul. Steph.* Sed ibi agitur de alio bello, nimirum de expeditione adversus Amazonas: quod exemplum, quum statim subjiciatur illi, de quo Auctor heic, ideo unum idemque esse putavit; eo facilius, quod ibi est *κἀνταῦθα*. *J. B.*

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4 And names implying Virtue are given to this office, as *humanity**, *mercy, compassion, religion, a feeling for our common nature, a recollection of our human condition, a work of kindness.* [See the authors.] The Donatists who refused burial to the bodies of Catholics are accused of *impiety.* So Papinius [Statius]. Spartian says that such are *without reverence for humanity.* So Livy, Homer, Lactantius. [See.]

II. 1 There are different opinions as to the origin of this prac-

* An expression which, in this sense, Grotius wrongly ascribes to Cicero. J. B.

peliri vetabant, impietatis accusat Optatus Milevitanus. Apud Opt. vi.
Papinium (*Theb.* XII. 165):

> Bello cogendus et armis
> In mores hominemque Creon.

Spartianus tales ait esse sine humanitatis reverentia: Livius *Spart. Vit. Caracc.* c. 4. sævitiam vocat ultra humanarum irarum fidem. [e]Homerus Lib. viii. 24. dixerat ἀεικέα ἔργα. Eorum qui supervacaneam facerent sepulturam, Lactantius impiam vocat sapientiam. Eandem ob Lib. vi. 12. causam impius Eteocles Papinio. *Theb.* iii. v. 98.

II. 1 Quæ primum causa moris hujus introducendi fuerit ut corpora humo tegerentur, sive condita prius, ut apud Ægyptios, sive cremata, ut apud Græcos plerosque, sive ita uti *Genes.* I. 2. Tacit. *Hist.* v. 5. sunt, quem morem esse antiquissimum notavit Cicero et post *De Leg.* ii. 22. eum [f]Plinius, de eo non idem omnibus videtur. Nam Moschion existimat occasionem datam ex gigantea feritate mandendi homines, cujus abolitæ signum sepulturam; ita enim ait: Apud Stob. *Eclog. Phys.* Tit. xi. [[Lib. I. cap. I. § 38, vv. 51—54.]]

> Tunc morte raptos imperatum legibus
> Mandare terræ, pulveremve inspargere
> Necdum sepultis, ne darentur conspici
> Abominanda signa pastus pristini.

2 Aliis videntur hoc modo homines velut sponte solvisse debitum, quod alioqui vel ab invitis repetit natura. Nam

[4] Nullibi in Oratione Ciceronis, ad quam remittit margo, reperitur vox *humanitatis*, juri sepulturæ adcommodata. Originem erroris, in hoc et aliis locis laudatis, ostendent Notæ nostræ Gallicæ: harum enim modus non patitur, ut omnia dicamus, præsertim in isto et præcedenti Capite, quæ omnium maxime talibus ἀβλεψίαις scatent. *J. B.*

[d] *Lactantius*] Cujus et hoc est Lib. VI. c. 12. *Ultimum illud et maximum pietatis officium est, peregrinorum et pauperum sepultura.*

[e] *Homerus dixerat* ἀεικέα ἔργα] Idem *Iliados* ο' Jovem et Deos Achilli iratos fuisse dicit, ob male tractatum corpus Hectoris, [vers. 113, *et seqq.* Locus autem in contextu laudatus est *Iliad.* XXII. 395. et XXIII. 24. *J. B.*]

[f] *Plinius*] *Historiæ Naturalis* VII. 54. ubi et hoc: *Sepultus intelligitur quoquo modo conditus: humatus vero, humo contectus.*

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tice of burying bodies: either first embalming them, as the Egyptians did; or burning them, as among the Greeks mostly; or without preparation, which Cicero notes as the oldest practice. Moschion thought the custom intended to be a memorial of the abolition of the practice of eating human bodies. [See.]

2 Others regard it as a willing payment of a debt to Nature, which, if not given, she will take. That man is made from earth, was not only told to Adam by God. Cicero also quotes from Euripides, *Earth to earth;* and in Eccl. xii. 7, we read, *Then shall the dust return to the*

hominis corpus [g] ex terra ortum terræ deberi, non Deus tantum Adamo edixit, sed et Græci Latinique passim agnoscunt.

Tusc. Q. iii. 25. Cicero ex Euripidis Hypsipyle:

Reddenda terræ terra.

Eccl. xii. 7. Et quod apud Salomonem legimus pulverem quidem ad terram redire quale fuerat, spiritum autem ad Deum qui dederat, Euripides hoc ipsum argumentum ex persona Thesei in *Supplicibus* tractans sic ait (vers. 531, et seqq.):

Jam sinite terræ mortuos gremio tegi:
Res unde quæque sumserat primordium
Eo recipitur: spiritus cœlo redit,
Corpusque terræ: jure nec enim mancupi,
Sed brevis ad ævi tempus utendum datur:
Mox terra repetit ipsa quod nutriverat.

Lucretius similiter de terra (Lib. v. vers. 1260):

Omniparens eadem rerum est commune sepulchrum.

Cap. 22. Cicero *de Legibus* II. ex Xenophonte: *redditur terræ corpus, et ita locatum ac situm quasi operimento matris obducitur.*

[g] *Ex terra ortum terræ deberi*] Job. x. 9. Philo *in Flaccum:* ἀνθρώποις ἡ φύσις οἰκειότερον χωρίον ἀπένειμε γῆν, οὐ μόνον ζῶσιν, ἀλλὰ καὶ ἀποθανοῦσιν, ἵν' ἡ αὐτὴ καὶ τὴν πρώτην ὑποδέχηται γένεσιν, καὶ τὴν ἐκ τοῦ βίου τελευταίαν ἀνάλυσιν. *Proprium hominibus locum natura terram tribuit, nec vivis tantum, sed et mortuis, ut eadem quæ primos suscepit natales, suscipiat et ex hac vita exitum.* (Pag. 991 c.) Attamen, sicut nullum est in homine factum laudabile, cujus non vestigium in alio aliquo animantium genere Deus posuerit, ita et in hac re evenit: de Formicis Plinius libro XI. 30. *Sepeliuntur inter se viventium solæ, præter hominem.* At is ipse de Delphinis Lib. IX. 8. *conspectique jam defunctum portantes ne laceraretur a belluis.* Et de Apibus Virgilius (*Georg.* IV. 256):

Tum corpora luce carentum,
Exportant tectis, et tristia funera ducunt.

Servius: *cum exsequiali scilicet pompa.*

[5] Non id dixit Democritus: sed ecce verba PLINII, quorum sensum mutavit Auctor, dum ex memoria citaret, vel festinanter legeret: *Similis est et de adservandis corporibus hominum, ac reviviscendi, promissa Democrito vanitas, qui non revixit ipse.* Agitur ibi tantum de resurrectione quadam, cujus imaginem sibi finxerat Philosophus, quamque Plinius vocat *adservationem corporum* humanorum. Auctor vel legit, vel in mente habuit, quasi verba sic posita

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earth as it was, and the spirit shall return to God who gave it. See Euripides; Lucretius; Cicero, from Xenophon. Pliny says that the earth receives us when we are born*, nourishes us as we grow up, feeds us at every age, and at last receives us into its bosom as a mother, when the rest of nature rejects us.

3 Others think that the hope of the resurrection was intended to be marked by this practice, and transmitted to posterity. So Demo-

* Referring to the practice of laying a new-born child on the ground. *Gronov.*

Plinius quoque scripsit, terram nos nascentes excipere, natos alere, semelque editos sustinere semper, novissime complexam gremio jam a reliqua natura abdicatos, ut matrem operire. *Hist. Nat.* ii. 63.

3 Sunt qui resurrectionis spem a primis humani generis parentibus, hoc veluti monumento, posteris consignatam putant. Nam et ob reviviscendi promissum adservanda corpora docuisse [g]Democritum Plinius testis est, libro septimo, capite quinquagesimo quinto. Christiani autem sæpe morem honeste condendi corpora ad hanc spem referunt. Prudentius: *Hymn.* x. 53. *et seqq.*

> Quidnam sibi saxa cavata,
> Quid pulchra volunt monumenta,
> Nisi quod res creditur illis
> Non mortua, sed data somno?

4 Simplicius est, cum homo cæteris animantibus præstet, indignum visum si ejus corpore alia animantia pascerentur: quare inventam sepulturam ut id quantum posset caveretur. Miseratione hominum custodiri corpora [h]ab incursu avium ferarumque dixit Quintilianus. Apud Ciceronem de Inventione *Decl.* vi. p. 95.

essent; *De adservandis corporibus hominum*, OB REVIVISCENDI PROMISSA. *J. B.*

[h] *Ab incursu avium ferarumque*] Vide vaticinium de Jeroboami posteritate in pœnam peccatorum ejus, 1 Regum xiv. 11. Et Tertullianum *de Resurrectione.* De Ægistho Homerus *Odysseæ* Γ. (vers. 258):

> Τῷ κε οἱ οὐδὲ θανόντι χυτὴν ἐπὶ γαῖαν ἔχευον,
> Ἀλλ' ἄρα τόνγε κύνες τε καὶ οἰωνοὶ κατέδαψαν.

> Ergo nec leviter glebam injecere peremto,
> Illius ut volucres lacerarent ossa canesque.

De Ægistho loquitur, quem ut adulterum et regni invasorem Argivi insepultum abjecerant, [immo abjecturi fuissent, si Argis fuisset. Inspice locum. *J. B.*] cujus tamen reliquias humanior terræ dedit Orestes, ut mox dicetur. Menelaus de Ajace in Sophocle (*Ajac.* vers. 1083):

> Ἀλλ' ἀμφὶ χλωρὰν ψάμαθον ἐκβεβλημένος
> Ὄρνισι φορβὴ παραλίοις γενήσεται.

> Sed ille arenis jactus in pallentibus,
> Gratum marinis pabulum alitibus dabit.

Sed hoc quoque ibi prohibet Ulysses, prudentiæ exemplar. Sophocles *Antigone* in ipsius Antigones laudem (vers. 711, *et seqq.*):

> Ἥτις τὸν αὑτῆς αὐτάδελφον ἐν φοναῖς
> Πεπτῶτ' ἄθαπτον, μήθ' ὑπ' ὠμηστῶν κυνῶν
> Εἴασ' ὀλέσθαι, μήθ' ὑπ' οἰωνῶν τινος.

> Illa obsitum cruore germanum suum
> Non insepultum sivit alitibus feris,
> Canibusque fieri pabulum mordacibus.

Appianus civilium I. *de interfectis jussu*

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critus seems to have thought*. The Christians often refer the practice of burial to this hope. So Prudentius; *What mean hollowed stones, what mean sculptured tombs, save that what we trust to them is not dead, but sleepeth?*

4 It is more simple to say, that considering the superiority of man to other animals, it was deemed unworthy of him that other animals should feed on him, and that sepulture was invented to obviate this.

* The passage is wrongly quoted and misunderstood. J. B.

Cap. 55. primo: *a feris vexatus, communi honore in morte caruit.* Et apud Virgilium legimus (*Æn.* x. 557, et seqq.):

Non te optima mater
Condet humo, patriove onerabit membra sepulchro:
Alitibus linquere feris.

Jer. xxii. 19. 1 *Reg.* xxi. 19. Et Deus invisis sibi regibus minatur apud prophetas, futurum, ut asini sepulturam habeant, ut canes eorum sanguinem lingant. Lib. vi. 12. Nec aliud in sepultura considerat Lactantius cum ait: *Non enim patiemur figuram et figmentum Dei, feris ac volucribus in prædam jacere;* De *Tob.* c. 1. et Ambrosius, cujus hæc verba sunt: *Nihil hoc officio præstantius, ei conferre, qui jam tibi non potest reddere: vindicare a volatilibus, vindicare a bestiis consortem naturæ.*

5 Sed etsi tales abessent injuriæ, proteri tamen ac lancinari corpus humanum, alienum merito videtur ab istius naturæ dignitate. Unde non abit illud in Sopatri controversiis: *ὅτι τὸ θάπτειν καλὸν, καὶ ὅτι τοιοῦτον ἡ φύσις ἐξεῦρε τοῖς σώμασιν, ἵνα μὴ διαλυόμενα μετὰ θάνατον γυμνὰ, καθάπερ αἰσχύνηται. τοῦτο τῇ φύσει καλὸν, τοῦτο φιλάνθρωπον. τοῦτο τοῖς ὅλοις δοκεῖ, εἴτε θεοὶ εἴτε τινὲς ἥρωες ταύτην μετὰ θάνατον τοῖς ἀνθρώποις τὴν τιμὴν κατεστήσαντο. ἐπειδὰν καὶ οὐκ εὔλογον τὰ τῆς φύσεως ἀπόῤῥητα μετὰ τὴν τελευτὴν ἅπασι δείκνυσθαι, γῇ κρύπτειν τὸν ἄνθρωπον νενομίκαμεν ἄνωθεν, ἵνα τῷ καλύπτεσθαι μνήματι ἐλάνθανε τὸ σῶμα διαλυόμενον· Honestum esse humare mortuos, et ab ipsa natura quasi concessum corporibus, ne velut probro afficiantur post mortem si nuda diffluant: [hoc natura esse honestum, hoc humanum:] placere id omnibus, sive Dei fuerint sive semidei, qui hunc functis vita corporibus hono-*

Marii: ταφήν τε οὐδενὶ ἐξῆν ἐπενεγκεῖν εἰς οὐδένα τῶν ἀναιρουμένων, ἀλλ' οἰωνοὶ καὶ κύνες ἄνδρας τοιούσδε διεσπάσαντο· Nec cuiquam licebat quenquam interfectorum sepelire, sed viros tam egregios lacerabant aves et canes, (pag. 394. *Ed. Steph.*) Ammianus Marcellinus principio libri xvii. *de Juliano: Sollicitusque ne diræ volucres consumerent corpora peremtorum, sine discretione cunctos humari mandavit,* (cap. 1.)

[1] *Τὴν ἀσχημοσύνην τῆς φύσεως*] Simili modo Agathias dicit moris esse *τὰ αἰσχυντηλὰ τῶν ὠδίνων ἐπικαλύπτειν·*

The pity of men protects the body from birds and beasts, says Quintilian. To be devoured by beasts was considered shocking. So Cicero, Virgil, Jerem. xxii. 19, 1 Kings xxi. 19, Lactantius, Ambrose.

5 And even without regarding such insults, it seems unfit for the dignity of man's nature that his body should be torn and crushed. So

rem indulserunt. Quia enim a ratione alienum est, naturæ humanæ arcana post mortem omnibus conspicua exponi, morem inde ab antiquo accepimus humana corpora sepeliendi, ut monumento condita clam et procul a conspectu tabescant: quo et illud pertinet Gregorii Nysseni in epistola ad Letoïum: *ὡς μὴ ἀναδειχθῆναι τῷ ἡλίῳ* [1]*τὴν ἀσχημοσύνην τῆς φύσεως, ne soli ostendatur id quod dedecori est humanæ naturæ.*

6 Hinc est quod officium sepeliendi, non tam homini, id est, personæ, quam [k]humanitati, id est naturæ humanæ, præstari dicitur: unde publicam hanc humanitatem dixerunt Seneca et Quintilianus, tralatitiam Petronius. Cui consequens est, ut nec inimicis nec hostibus invideri sepultura debeat. De inimicis egregia est apud Sophoclem dissertatio [6]Ulyssis pro humando Ajace, ubi hoc inter cetera: *De Benef.* v. 20. Quint. *Decl.* VI. *Satyr.* c. 114.

Menelae, post tot dicta sapienter, cave
Injuriosus sis in hominem mortuum.

Rationem reddit Euripides *Antigone:* *Frag.* vv. 39, 40.

Mors jurgiorum finis est mortalibus:
Num majus aliud quid potest letho dari?

Idem *Supplicibus* (vers. 528, 529):

Fecere vobis siquid Argivi male,
Cecidere; in hostes ista vindicta est satis.

Et Virgilius (*Æn.* XI. 104):

Nullum cum victis certamen et æthere cassis.

Quam sententiam citans scriptor ad Herennium addit: [7]*Nam quod malorum est extremum, accidit illis jam.* Papinius: *Theb.* xii. 573.

Bellavimus: esto:
Sed cecidere odia, et tristes mors obruit iras.

Et eandem causam reddit Optatus Milevitanus: *Si inter vi-*

Obtegere puerperii pudorem. (Lib. v. c. 6.) Ita quam nihil natura simus apparet in ortu et interitu. Quod ut significarent Sapientes Hebræi, vetuere, ne plebeiæ aut summæ fortunæ qui essent, aliusmodi fasciis involverentur, aut modo nati aut mortui.

[k] *Humanitati, id est naturæ humanæ præstari dicitur*] Servius ad XI. *Æneidos: Sepulturæ enim beneficium generaliter debetur universis,* (ad vers. 106.)

[6] Non Ulyssis, sed Chori, vers. 1110, *et seqq. J. B.*

[7] Nullibi in *libris ad Herennium* hoc

Sopater, Gregory Nyssen.

6 Hence the office of burial is conceived as rendered, not so much to the man, that is, the particular person, as to Humanity, that is, to Human Nature. So Seneca and Quintilian call it *public humanity*, Petronius, *transferred humanity.* And hence it follows, that sepul-

ventes fuerat certamen, odia vestra vel mors aliena compescat: jam tacet cum quo ante litigabas.

III. 1 [1]Quare et hostibus publicis deberi sepulturam omnes sentiunt. Belli hoc jus κοινὸν ἐν τοῖς πολέμοις vocat Appianus, belli commercia Philo. Tacitus: *Ne hostes quidem sepulturam invident.* Dio Chrysostomus servari hoc jus ait etiam ἐν τοῖς πολεμίοις, apud hostes: addit: κἂν εἰς ἐσχάτην ἔχθραν προέλθωσι· *etiamsi ad summum odia processerint.* De eadem re agens Lucanus hominum ritus in hoste servandos dixit. Sopater idem qui supra: τίς πόλεμος ταύτης τῆς τιμῆς τὸ τῶν ἀνθρώπων γένος ἐστέρησε, τίς ἔχθρα μνησικακήσασα πρὸς τὰ πλημμελήματα παραβῆναι τὸν θεσμὸν τοῦτον ἐνέσχετο; *Quod bellum hoc ultimo honore humanum privavit genus? quæ inimicitia eousque extendit malefactorum memoriam, ut hanc legem violare auderet?* Is quem dixi Dio Chrysostomus oratione de lege: διὰ τοῦτον τοὺς ἀποθανόντας οὐδεὶς ἔτι κρίνει πολεμίους, οὐδὲ τὴν ἔχθραν

Pag. 63. *In Flacc.* p. 974 A. *Ann.* i. 22. *Orat. de Consuet.* p. 649 C. *Phars.* vii. 801. Pag. 647 D.

reperitur. Habet Auctor ex ALBERICO GENTILI, *De Jure Belli*, Lib. II. cap. 24. pag. 459. *Edit. Hanov.* ubi locus plenius adfertur, tamquam ex III. *Rhet. ad Herenn.* qui liber, ut ipse postea observat, pag. 531. non est Ciceronis, si Virgiliana habet. Post primam Editionem, casu incidi in fontem erroris. Scriptor Neapolitanus, *Ant. Sebastian. Minturnus*, Lib. III. *De Poeta*, pag. 207. *Ed. Venet.* 1559. adlato Virgilii versu, statim de suo subjicit: *Quippe quibus tum accidit, quod malorum omnium extremum est.* Hæc quum legisset, ipse Italus, Alberic. Gentilis, et memoriter laudavit, et ex vetusto Auctore Libb. ad Herennium sibi animo retenta putavit, ita ut etiam verba quædam paululum immutaverit. Ejusmodi lepida, ut ita dicam, παροράματα, plura forte deprehenderemus, si semper indagari aut sese offerre possent loca, ubi cubile est citationum per manus ab uno libro in alium propagatarum. *J. B.*

[1] *Quare et hostibus publicis deberi sepulturam omnes sentiunt*] Philo *in Flaccum*: ἤδη δὲ καὶ τοὺς πεσόντας ἐν τῷ πολέμῳ τῶν ἐχθρῶν ταφῆς ἀξιοῦσιν, οἱ μὲν ἐπιεικεῖς καὶ φιλάνθρωποι ταῖς οἴκοθεν δαπάναις, οἱ δὲ τὴν ἔχθραν καὶ πρὸς τοὺς νεκροὺς ἀποτείνοντες, ὑπόσπονδα τὰ σώματα διδόντες ὑπὲρ τοῦ μὴ τῆς τελευταίας χάριτος ἀμοιρῆσαι τῶν νομιζομένων· *Etiam qui in bello occubuerunt eos homines solent ad sepulturam dare, illi quidem quibus*

ture ought not to be withheld, either from our friends or from enemies. See this thought in the *Ajax* of Sophocles: in Euripides: in Virgil, and the writer to Herennius, who quotes him*. So Papinius [Statius] and Optatus speak of death terminating all enmity.

III. 1 Hence all agree that sepulture is due to public enemies; and is a right of war. So Appian, Philo, Tacitus, Dio Chrysostom, Lucan, Sopater, Dio Chrysostom again.

* A mistake of Grotius, which Barbeyrac has ingeniously traced.

καὶ τὴν ὕβριν εἰς τὰ σώματα αὐτῶν ἐπιδείκνυται· propter hanc mortuos nemo hostes judicat; neque ira et contumelia in eorum corpora extenditur.

2 [m]Et passim extant exempla. Sic Hercules suos hostes, Alexander victos ad Issum, Hannibal C. Flaminium, P. Æmilium, Tiberium Gracchum, [n]Marcellum, Romanos quæsivit ad sepulturam. *Credas,* inquit Silius Italicus, *Sidonium cecidisse ducem.* Idem Hannoni a Romanis præstitum, Mithridati a Pompeio, a Demetrio multis, Archelao regi ab Antonio. In Græcorum adversus Persas militantium juramento erat: *Socios* [s]*omnes sepeliam: bello victor etiam barbaros:* et passim in historiis legas impetratam *νεκρῶν ἀναίρεσιν,* [o]*facultatem tollendi mortuos.* Apud Pausaniam in Atticis exemplum est: *τοὺς δὲ Μήδους Ἀθηναῖοι μὲν θάψαι λέγουσιν, ὡς πάντως ὅσιον ἀνθρώπου νεκρὸν γῇ κρύψαι· Medos Athenienses a se sepultos aiunt, quia qualemcumque mortuum terra condi fas sit.*

Ælian. *Var. Hist.* xii. 27.
Diod. Sic. xvii. 40.
Liv. xxii. 7.
Ibid. c. 52.
Idem, xxv. 17.
De B. Pun. xv. 389.
Val. Max. v. i. 2.
App. *Alex.* p. 250.
Vid. Plut. *in ejus Vit.* p. 896 A.
Idem, Vit. Ant. p. 917 B.
Lib. i. 32.

bonitatis et humanitatis plus est, suopte impendio, alii vero qui odia et in mortuos extendunt, sub pactis dantes corpora, ne careant eorum quæ mos imperat honore ultimo, (pag. 974 A. *Ed. Paris.*)

[m] *Et passim exstant exempla*] Josephus *in Legibus: θαπτέσθωσαν δὲ καὶ οἱ πολέμιοι· Sepeliantur et mortui* [*hostes. Ant. Jud.* IV. 8. § 24. *Edit. Hudson.*] Agamemnon Trojanos sepelit *Iliados* H. (vers. 396, *et seqq.*) Antigonus Pyrrhum apud Plutarchum, (pag. 406.) Vide eundem in *vita Thesei,* (pag. 14 A.)

[n] *Marcellum*] Plutarchus *Marcello,* [pag. 316. Adde CICERONEM, *De Senect.* c. 20.]

[s] Habet hoc Auctor procul dubio e DIODORO SICULO: sed dum pravam interpunctionem sequitur, festinanter legendo, sensum plane alienum nobis offert. En verba Græca: Ἀλλὰ τοὺς ἐν τῇ μάχῃ τελευτήσαντας τῶν συμμάχων πάντας θάψω· καὶ κρατήσας τῷ πολέμῳ τῶν βαρβάρων, οὐδεμίαν τῶν ἀγωνισαμένων πόλεων ἀνάστατον ποιήσω. &c. Id est: *Sed socios in prælio mortuos omnes sepeliam: ubi vero bello Barbaros vicero, nullam urbium devictarum vastabo* &c. Lib. XI. cap. 29. pag. 258. *Ed. H. Steph.* Vides ibi de Sepultura hostium nequaquam agi. *J. B.*

[o] *Facultatem tollendi mortuos*] Vide infra Lib. III. c. XX. § 45.

2 And examples occur in abundance. Enemies were buried by Hercules, Alexander, Hannibal; of the latter case Silius says, *You might have supposed the dead man a Sidonian leader.* So the Romans buried Hanno; Pompey, Mithridates; Demetrius, several: Antony, Archelaus. The oath of the Greeks who marched against the Persians included this*. And we constantly read in history that the vanquished obtained permission to bury their dead. So Pausanias says the Athenians buried the Medes.

* A mistake of Grotius, as Barbeyrac shews.

3 Quare Hebræorum veterum interpretatione Pontifex
Levit. xxi. 1. *et seqq.* Maximus, cum alioqui rei ulli funebri interesse vetaretur, repertum tamen hominem [p]insepultum sepelire etiam jubebatur.
Ambros. Offic. ii. 23. Christiani vero tanti fecerunt sepulturam, ut ejus causa, sicut ad pauperes alendos, aut ad captivos redimendos, vasa ecclesiæ etiam initiata conflari aut vendi licite existimaverint.

4 Sunt quidem et exempla in contrarium, sed communi judicio damnata:

Hunc oro [q]defende furorem:

est apud Virgilium (*Æn.* x. 905):

Hominemque cruentus
Exuit, et tenuem cæsis invidit arenam.

De Bell. Gild. 397. Apud Claudianum. Diodorus Siculus: τὸ πολεμεῖν τῶν ὁμοφύλων τοῖς τεθνηκόσι θηριῶδες· *Bibl.* v. 29. *ferinum est bellum gerere cum mortuis qui ejusdem naturæ fuerint.*

IV. 1 De insigniter tamen facinorosis video esse dubitandi causas. Lex divina Hebræis data, ut omnis virtutis ita et humanitatis magistra, illos ipsos qui suspensi patibulo erant (quod valde ignominiosum censebatur. Num. xxv. 4; Deut.
Bell. Jud. iv. 5. § 2. xxi. 23; 2 Sam. xxi. 13) eodem die sepeliri jubet. Hinc Josephus tantum Judæis ait esse curam sepulturæ, ut eos etiam quorum corpora ad publicum supplicium damnata sunt, ante solis occasum tollant et humo mandent: et alii Hebræorum interpretes addunt exhibitam hanc reverentiam divinæ imagini ad quam homo sit conditus. Ægisthum, qui adulterium cæde

p *Insepultum sepelire etiam jubebatur*] Idem ex jure pontificio Romano Servius notat (ad *Æneid.* VI. 176.)

q *Defende furorem*] Interpretatur Servius, *Inimicorum iram et post fata sævire cupientem.*

r *Sepulturæ tradi non vetamus*] Hujus Romanorum moris mentio est apud

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3 The Hebrew High Priest, though on other occasions forbidden to have anything to do with a funeral, was yet commanded to bury a dead body if he found it by accident. Christians thought the burial of the dead so important, that in order to do it, as in order to relieve the poor, or to ransom captives, they thought it lawful even to sell the consecrated vessels of the church.

4 There are examples of burial denied, but they are condemned by the common judgment. See Virgil, Claudian, Diodorus.

IV. 1 With regard to great criminals, there seem to be doubts. The Hebrew law directed the bodies of those who were publicly executed to be taken away and buried before sunset: and the commentators note this as an evidence of reverence for the divine image in

regis cumulaverat, a regis interfecti filio Oreste humo mandatum Homerus memorat Odysseæ tertio. Sed et apud Romanos Ulpianus corpora eorum qui capitis damnantur cognatis ait neganda non esse: imo et quibuslibet petentibus danda censuit Paulus jurisconsultus. Et Diocletianus ac Maximianus Imperatores ita responderunt: *obnoxios criminum digno supplicio affectos* [r] *sepulturæ tradi non vetamus.*

Vv. 309, 310. *Leg.* 1. *ff de cad. Pun.* Lib. iii. *ibid.* Lib. ii. *C. de Relig.*

2 Legimus quidem in historiis exempla eorum, [s] qui insepulti abjecti sunt, frequentiora civilibus quam externis bellis: et hodie videmus quorundam damnatorum corpora diu in publico conspectu relinqui: qui tamen mos an laudandus sit disputant, non politici tantum, sed et theologi.

Roch. *de Consuet.* f. 12. Abb. *in c. ex part. de sep.* Sylv. *in Verb. Sepult. Quæst.* 13.

3 Contra, laudatos videmus qui sepeliri jusserunt corpora eorum, qui id ipsum aliis non permiserant, ut Pausaniam Lacedæmoniorum regem, qui incitatus ab Æginetis ut Persarum factum in Leonidam simili facto ulcisceretur, consilium ut se ac Græco nomine indignum rejecit. Apud Papinium Theseus Creontem sic alloquitur (*Theb.* XII. 780):

Vade atra daturus
Supplicia, extremique tamen secure sepulchri.

Alexandrum quoque Jannæum regem, qui in mortuos populares valde contumeliosus fuerat, sepelierunt Pharisæi. Quod si Deus interdum sepulturæ jactura quosdam puniit, fecit hoc suo jure supra leges constitutus. Et quod Goliathi caput David servavit ostentui, factum scilicet in alienigenam, Dei

Jos. *Ant.* xiii. 16. et Gorion.

Philonem *contra Flaccum*, (pag. 977 A.)

[s] *Qui insepulti abjecti sunt*] Id ἀταφίᾳ ὑβρίζειν τὸν νεκρὸν dixit Josephus in morte Judæorum regis Alexandri, (*Ant. Jud.* Lib. XIII. c. XV. § 4. *Ed. Hudson.*) Adde Quintilianum declamatione quarta, (cap. ix. *Ed. Burman.*)

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which man is made. Egisthus was buried by Orestes. Among the Romans, the bodies of those executed were not denied to their relatives; or even to any who asked for them, as Paulus thought. So Diocletian and Maximian directed.

2 Examples of bodies thrown out unburied, are more common in civil than in foreign wars. And at this day, some criminals are gibbeted and left in public view: but whether this be a laudable practice, is disputed both by politicians and by theologians.

3 On the other hand, we find persons praised, for ordering the bodies of those to be buried who had themselves refused the rite to others, as Pausanias. So Statius makes Theseus act to Creon. So the Pharisees buried Alexander Jannæus. If God punished some by

contemtorem, et sub ea lege quæ proximi nomen ad solos Hebræos porrigebat.

V. 1 Unum tamen notatu non indignum, de sepeliendis mortuis regulam apud ipsos Hebræos habuisse exceptionem

Lib. iii. 8 § 5. *De Bell. Jud.* *Heges.* iii. 17. [9] eorum qui ipsi sibi mortem consciverant: quod Josephus nos docet. Nec id mirum, cum in hos aliud supplicium constitui

Gel. xv. 10. Plut. *de Mul. Virt.* Tom. II. p. 249. Plin. xxxvi. 15. Plut. *Ag. et Cleom. Vit.* p. 823. *Nic.* v. 15. Pag. 332. non possit qui mortem pro supplicio non habent. Sic Milesiæ virgines a voluntaria morte absterritæ, et [t] plebs olim Romana, quanquam improbante Plinio. Sic et Cleomenis corpus, qui se interfecerat, Ptolomæus suspendi jussit. Et [u] passim receptum, ait Aristoteles, ut ignominia aliqua afficiantur qui sibi mortem consciverunt: ubi Andronicus Rhodius id exponens ait, sepultura eorum corpora prohiberi: quod inter alia

Orat. lxiv. p. 592 D. Demonassæ Cypri Reginæ scita laudat Dion Chrysostomus. Neque huic mori obstat quod Homerus, Æschylus, Sophocles,

Vid. Stob. *Tit.* 126. et Soph. *Ajac.* Moschio, et alii monent, nihil sentire mortuos: quare nec damno

[9] Exceptio illa hoc tantum efficiebat, ut cadavera eorum, qui sibi ipsi mortem consciverant, usque ad Solis occasum manerent insepulta. Ita diserte JOSEPHUS, loco in ora libri indicato: Τοὺς γοῦν ἀνελόντας ἑαυτοὺς, παρὰ μὲν ἡμῖν, μέχρις ἡλίου δύσεως ἀτάφους κρύπτειν ἔκριναν, καί τοι καὶ πολεμίους θάπτειν θέμιτον ἡγούμενοι &c. HEGESIPPUS autem loquitur de moribus et legibus aliorum Populorum: *Hæc non solum moribus hominum, sed etiam legibus, interdicta accipimus: namque alii insepultos projici jubent eos, qui se in ferrum dejecerunt... alii dextram manum abscindunt defunctis,* &c. Hoc ultimum genus pœnæ recentum erat Athenis, ut Auctor ipse observat mox, Nota *u*. *J. B.*

[t] *Plebs olim Romana*] Servius ad 12. *Æneidos: Sane sciendum quod cautum fuerat in Pontificalibus libris, ut qui laqueo vitam finisset insepultus abjiceretur. Unde merito ait* INFORMIS LETHI, *quasi mortis infamissimæ. Ergo cum nihil sit hac morte deformius, Poetam etiam pro Reginæ dignitate dixisse accipiamus. Cassius autem Hemina ait Tarquinium Superbum, cum cloacas facere populum coegisset, et ob hanc injuriam multi se suspendio necarent, jussisse corpora eorum cruci affigi. Tunc primum turpe habitum est mortem sibi consciscere,* (ad vers. 603.)

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denying them sepulture, he did this by his own right. David's proceeding with Goliath's head was no general case.

V. 1 The Hebrews, however, made one exception, in the case of those who had died by their own hands. And this is fit; for there can be no other punishment, for those to whom death is no punishment. So the Milesian virgins, and the Plebs at Rome were deterred from suicide. So Ptolemy ordered the body of Cleomenes to be hung. And it is, says Aristotle, a common practice, as Andronicus explains him. And on this ground, Dion lauds Demonassa, queen of Cyprus. And it is no objection, that, as the poets sometimes say, the dead feel nothing, and are not affected by loss or shame. For it is enough if

nec pudore affici. Satis enim est, id quod mortuis accidit, a vivis metui, ut hoc pacto a peccato retrahantur.

2 Optime enim Platonici contra Stoicos, et si qui alii servitutis et morbi fugam, imo et spem gloriæ pro justa causa mortis voluntariæ admittebant, sentiunt retinendum animum in custodia corporis, nec injussu ejus, a quo ille nobis est datus, ex hac vita demigrandum; quam in rem multa videre est apud Plotinum, Olympiodorum, et Macrobium ad somnium Scipionis. [1]Hanc sententiam secutus Brutus olim Catonis factum, quod imitatus postea est, [x]damnaverat, *ὡς οὐχ ὅσιον οὐδ' ἀνδρὸς ἔργον ὑποχωρεῖν τῷ δαίμονι, καὶ μὴ δέχεσθαι τὸ συμπίπτον ἀδεῶς, ἀλλ' ὑποδιδράσκειν· quippe nec pium censens nec virile cedere fortunæ, et imminentia adversa, quæ ferenda fortiter erant, subterfugere.* Plut. *Vit. Brut.* p. 1002 E. Et Megasthenes notabat ab Indorum sapientibus reprehensum Calani factum, neque enim eorum placitis probari [y]talem exitum hominum vitæ impatien- Strab. xv. p. 718.

[u] *Passim receptum*] Athenis Æschinis tempore ejus qui se interfecisset manus seorsim a corpore sepeliebatur. Æschines *in Ctesiphontem*, (pag. 309 E.) Adde Hegesippum Lib. III. cap. 17.

[1] Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. II. c. 4. § 19. *J. B.*

[x] *Damnaverat*] Et Philosophorum non pauci extra Stoicos. Seneca epist. LXX. *Invenies etiam professos sapientiam, qui vim afferendam vitæ suæ negent, et nefas judicent ipsum interemtorem sui fieri. Expectandum esse exitum quem natura decrevit.* Procopius *Gothicorum* IV. *βίαιος καταστροφὴ ἄχρηστος καὶ ἄνοια προπετὴς, τὸ δὲ εἰς θάνατον θράσος, ἀνόητον τοῦ τε δραστηρίου πρόσχημα οὐκ εὐπρεπὲς τοῖς γε σώφροσιν εἶναι δοκεῖ. καί τοι καὶ τοῦτο ἐκλογίζεσθαι χρὴ, μή τι δόξητε εἰς τὸ θεῖον ἀγνωμονεῖν,* &c. *Violentus vitæ exitus res inutilis et plena insipientis impetus, et illa in mortem ferens audacia, consilio cum careat, prudentibus judicatur immerito sibi fortitudinis nomen usurpare. Tum vero et illud cogitandum, ne in Deum sitis ingrati.* (*Hist. Misc.* cap. 12.)

[y] *Talem exitum hominum vitæ impatientium*] Idem Arabibus visum, non minus quam Indis et Persis, ex Jobo discas III. 21.

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what is done to the dead deters the living.

2 The Platonists argued well, against the Stoics and others who thought that the need of a refuge from slavery and disease, and the hope of glory, were just causes of a voluntary death. They replied, that the soul must remain at its post in the body, and that we must not quit this life without His leave who placed us in it: as we find in Plotinus, Olympiodorus, Macrobius. On this ground, Brutus, at an earlier period, condemned the act of Cato, which he afterwards imitated. See Plutarch. And Megasthenes noted that the act of Calanus, [who burnt himself in the presence of Alexander and his army,] was blamed by the wise men of the Indians; for that their doctrine

tium. Nec aliena Persarum, ut videtur, sententia, quorum
Lib. v. 12. rex Darius apud Curtium, *alieno scelere, quam meo mori malo.*

3 Ideo Hebræi mori vocabant ἀπολύεσθαι, id est, *dimitti*, ut videre est non tantum Luc. ii. 29 sed et in Græca versione, Gen. xv. 2, et Num. xx. in fine; quod genus loquendi et Græcis usitatum. Themistius *de Anima:* ἀπολύεσθαι τὸν ἀποθνήσκοντα, καὶ τὴν τελευτὴν ἀπόλυσιν καλοῦσιν· *cum qui moritur aiunt dimitti, et mortem dimissionem vocant.*
Pag. 108 c. Tom. II. Apud Plutarchum in consolatione legimus hoc sensu: ἕως ἂν ὁ Θεὸς αὐτὸς ἀπολύσῃ ἡμᾶς· *donec Deus ipse nos dimittat.*

4 [z]Nonnulli tamen Hebræorum de lege se non interficiendi unam causam excipiunt, tanquam εὔλογον ἐξαγωγὴν, si quis videat se deinceps victurum in probrum ipsius Dei. Nam quia non nobis, sed Deo in vitam nostram jus esse statuunt,
Bell. Jud. ii. 8. § 5. (ut recte Josephus suos edocet) existimant præsumtam Dei

[z] *Nonnulli tamen Hebræorum*] Variasse Hebræorum super hac quæstione sententias cognoscas ex Josepho, ubi (*De Bell. Jud.* I. 2. p. 732,) de morte Phasaelis et de deliberatione Herodis (*Ant. Jud.* XVII. 9. p. 599 B.) agitur. Judæi ad Petronium, Philone recitante: ἀνακερασόμεθα τὸ ἴδιον αἷμα ἐπικατασφάξαντες ἑαυτούς. ἀποθανόντων τὸ ἐπίταγμα γενέσθω. Μέμψαιτ' ἂν οὐδὲ θεὸς ἡμᾶς, ἀμφοτέρων στοχαζομένους, καὶ τῆς πρὸς τὸν αὐτοκράτορα εὐλαβείας, καὶ τῆς πρὸς τοὺς καθωσιωμένους νόμους ἀποδοχῆς· γενήσεται δὲ τοῦτο, ἐὰν ὑπεκστῶμεν ἀβιώτου βίου καταφρονήσαντες· *miscebimus inter nos sanguinem, morte sponte sumta: tum mortuis ista imperentur. Ne Deus quidem nos culpet in duo intentos, ut et Imperatorem revereamur et sacratas leges custodiamus. Id autem ita demum efficere dabitur, si abeamus hinc contemta vita minime vitali.* (*De Legat. ad Caium*, pag. 1026 B. C.)

[a] *Ne tormentis adacti Christi religionem ejurarent*] Vide Eusebium. (*Hist. Eccl.* Lib. VIII. cap. 12.)

[b] *Ne pudicitiam amitterent*] Narrat Cicero nobilissimas virgines se in puteos abjecisse, et morte voluntaria nefariam turpitudinem depulisse, oratione de provinciis consularibus, (cap. 3.) Tale est et quod de Milesiis virginibus memorat Hieronymus *adversus Jovinianum*, (Lib.

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did not approve of such impatience of life. So Darius said, *I would rather die by another's crime than my own.*

3 Hence the Hebrews called death *dissolution* and *departure*, not only Luke ii. 29, but also in the Greek version of Gen. xv. 2, Num. xx. 29; which mode of speaking was also used by the Greeks. See Themistius, and Plutarch.

4 Some of the Hebrews make one exception to the rule against suicide, in a case of a *laudable retirement*, if any one foresees that he will in future live to the dishonour of God. For since God, not man, has a right to our lives, they think that the presumed will of God is the only thing which excuses the purpose of anticipating death.

voluntatem solam esse quæ mortis anticipandæ consilium absolvat. Atque huc referunt Samsonis exemplum, qui in suo corpore veram religionem videbat esse derisui, et Saulis, qui gladio incubuit, ne a Dei suisque hostibus illuderetur; nam hunc resipuisse volunt postquam Samuelis umbra mortem ipsi prædixerat, quam gnarus sibi imminere si pugnaret, prælium pro patria et Dei lege non detrectavit, æternam inde laudem meritus Davidis etiam præconio: a quo et ii qui Saulem cum honore sepelierant, recte facti testimonium retulerunt. Tertium est exemplum Razis Hierosolymitani senatoris in historia Maccabaica. Sed et in Christiana historia exempla legimus similia eorum, qui mortem sibi intulerunt, [a] ne tormentis adacti Christi religionem ejurarent, et virginum quæ [b] ne pudicitiam amitterent in flumen se jecerunt, quas et in martyrum censum Ecclesiæ retulit. Sed de his tamen [c] quid Augustinus sentiat videre est operæ pretium.

1 *Sam.* xxxi. 4.

2 *Macc.* xiv. 37.

Lib. i. *de Civ. Dei*, c. 26. *Epist.* 61. *ad Dulc. et* ii. 23. *contr. sec. Gaud. epist.*

I. pag. 48. Tom. II. *Ed. Basil.*) et epigramma vetus *Anthologiæ* Lib. III. 29. tit. *de Juvenibus*, incipiens *ὠχόμεθ' ὦ Μίλητε.* Narrant et Judæi feminam in navi ad stuprum expetitam, cum a marito quæsiisset an et mari mersa corpora essent resurrectura, isque id affirmasset, jecisse se in mare. Christianarum autem mulierum plurima sane habemus exempla. Feminarum Antiochenarum sub Diocletiano: Sophroniæ sub Maxentio, in Martyrologiis, Zonara, (Lib. XII. cap. 33) Sexto Aurelio. Alias Antiochenas sub Chosroe addit Procopius *Persicorum* II. (cap. 8.) Laudat virgines, quæ morte pudorem servarant, Ambrosius (*de Virginib.* Lib. III. p. 97. *Edit. Paris.* 1569.) Hieronymus in commentariis ad finem capitis primi Jonæ: *Unde et in persecutionibus non licet mihi propria perire manu, absque eo ubi castitas periclitatur.* [Vide quæ diximus in Libro Gallico *De doctrina Morali Patrum Eccl.* cap. xv. § 7, *et seqq. J. B.*]

[c] *Quid Augustinus sentiat*] Cui addere licet Chrysostomum in Gal. i. 4. (Tom. III. pag. 714) et Concilium Aurelianense III. *Oblationes defunctorum qui in aliquo crimine fuerint interemti, recipi debere censemus, si tamen non ipsi sibi mortem probentur propriis manibus intulisse.* Et tamen is ipse Augustinus Lib. I. *de Civitate Dei* c. 16: *At per hoc*

To this they refer the examples of Samson and of Saul. The former saw that in his person the true religion was scorned. The latter was restored to a right way of thinking, after the shade of Samuel had predicted to him his death; and though knowing that this was at hand, he did not refuse to fight for God and his country; and fell on his sword to avoid the insults of the enemy: thus obtaining eternal praise, even from David. The third example is that of Razis, in the history of the Maccabees, 2 Macc. xiv. 37. In Christian history also, we read similar examples of persons who have killed themselves, lest under the pressure of torments they might renounce the Christian religion: and of virgins who have drowned

5 Alteram quoque exceptionem apud Græcos obtinuisse
Diod. xvi. 25. video, quam Locri opponebant Phocensibus, ὅτι παρὰ πᾶσι τοῖς Ἕλλησι κοινὸς νόμος ἐστιν ἀτάφους ῥίπτεσθαι τοὺς ἱεροσύλους· *communem Græcis omnibus morem esse ut sa-*
Pag. 318 c. *crilegi insepulti abjiciantur.* Sic et Dion Prusæensis Rhodiaca τοὺς ἀσεβεῖς καὶ ἀνοσίους ait sepultura orbari. Idem
Tom. II. p. 834 A. Athenis [d]in proditores constitutum narrat Plutarchus Antiphonte. Sed, ut ad institutum me recipiam, ob negatam sepulturam bellum juste suscipi censuerunt veteres consensu magno: ut ex illa Thesei historia apparet, quam tractant Euripides dicta tragœdia *Supplicibus,* et Isocrates eo quem adduximus loco.

VI. Sunt et alia quædam quæ ex jure gentium voluntario debentur, ut longo tempore possessa, successiones ab intestato, et quæ ex contractu quantumvis inæquali veniunt. Nam hæc omnia quanquam ex jure naturæ ortum aliquatenus

et quæ se occiderunt ne quicquam hujusmodi paterentur, quis humanus affectus eis nollet ignosci? Capitulare autem Francicum libro VI. 70. *De eo qui semetipsum occidit aut laqueo se suspendit, consideratum est, ut si quis compatiens velit eleemosynam dare, tribuat, et orationes in psalmodiis faciat: oblationibus tamen et missis ipsi careant: quia incomprehensibilia sunt judicia Dei, et profunditatem consilii ejus nemo potest investigare.* Vide et ibidem VII. 344.

[d] *In proditores*] At Nicetas libro III. vitæ Alexii fratris Isaaci, (cap. 7) cum narrasset mortem Johannis Comneni Crassi, qui per seditionem imperium affectaverat, sic loquitur: μετὰ δὲ τὸ σῶμα ἐκεῖθεν ἀρθὲν, κυσὶ καὶ ὄρνισι βορὰ παρατίθεται· ὃ καὶ θηριῶδες μικροῦ καὶ ἀπάνθρωπον ἅπασιν ἐδόκει· *Post corpus inde ablatum, canibus et avibus esca ponitur: quod ab humanitate alienum ac pæne ferinum omnibus videbatur.*

themselves to save their chastity, and whom the Church places amongst its martyrs. But it is worth while to see what Augustine says of these cases.

5 I find that another exception obtained among the Greeks; which the Locrians objected to the Phocians: *It was the common usage of Greece that sacrilegious persons should be cast forth unburied.* So Dio Prusæensis. So traitors were treated at Athens, as Plutarch says.

But to return to my subject; the ancients were generally agreed in holding that war might justly be undertaken on account of sepulture denied; as appears by that history of Theseus which Euripides treats in the *Supplices,* and Isocrates in the Oration quoted.

VI. There are some other things which are due by the instituted Law of Nations; as possession by prescription, succession to intestates, and the results of contract, even if unequal. For all these,

habeant, accipiunt tamen ex humana lege firmitatem quandam, sive adversus conjecturæ incerta, sive adversus exceptiones quasdam quas alioqui ratio naturalis videtur suggerere: ut supra obiter a nobis de jure naturæ agentibus ostensum est.

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although in a certain way they have their origin in Natural Law, yet received from human law a certain firmness, both against the uncertainty of conjecture, and against exceptions which otherwise natural reason seems to suggest: as we shewed above in passing.

CAPUT XX.

DE PŒNIS.

I. *Pœnæ definitio et origo.*

II. *Spectare pœnam ad justitiam expletricem, et quomodo.*

III. *Pœnam certæ personæ naturaliter non deberi, sed exigi pœnam licite, quoad jus naturæ, ab eo qui paria non deliquerit.*

IV. *Pœnam utilitatis alicujus causa exigendam inter homines aliter quam apud Deum, et quare.*

V. *Quo sensu ultio naturaliter sit illicita.*

VI. *Utilitas pœnæ triplex.*

VII. *Pœna ad utilitatem ejus qui deliquit: eamque a quolibet exigi naturaliter, cum distinctione tamen:*

VIII. *Item ad utilitatem ejus in quem peccatum est; ubi de ultione licita jure gentium:*

IX. *Item ad utilitatem quorumlibet.*

X. *Quid lex Evangelica circa hanc materiam constituerit.*

XI. *Solvitur argumentum sumtum a Dei misericordia in Evangelio patefacta:*

XII. *Et a præcisione pœnitentiæ.*

XIII. *Rejiciuntur imperfectæ divisiones pœnarum.*

XIV. *Christianis privatis non esse tutum pœnam exigere, etiam ubi jure gentium id licet:*

XV. *Aut sponte ad accusationem prosilire:*

XVI. *Aut judicia capitalia affectare.*

XVII. *Leges humanæ quæ interfectionem ad pœnam permittunt an jus dent, an impunitatem solam, distinctione explicatur.*

XVIII. *Actus internos non esse punibiles inter homines:*

XIX. *Nec actus externos quos fragilitas humana nequit vitare:*

XX. *Nec actus quibus societas humana nec directe, nec indirecte læditur: cujus rei causa redditur.*

XXI. *Rejicitur sententia statuens ignoscere nunquam licere.*

XXII. *Ostenditur id licere ante legem pœnalem:*

XXIII. *Non tamen semper:*

XXIV. *Etiam post legem pœnalem.*

XXV. *Quæ ad id faciendum probabiles causæ intrinsecæ:*

XXVI. *Quæ extrinsecæ.*

XXVII. *Refellitur sententia statuens nullam esse justam causam dispensandi, nisi quæ per modum exceptionis tacitæ insit legi.*

XXVIII. *Pœnæ taxatio ex merito.*

XXIX. *Spectari hic causas impellentes, quæ inter se comparantur.*

XXX. *Item causas quæ a peccando abstrahere debuerant: ubi de gradibus præceptorum decalogi, quæ proximum tangunt, et alia quædam.*

XXXI. *Item aptitudinem peccantis ad utrumque, quæ varie spectatur.*

XXXII. *Meritum pœnæ extendi posse ad majus nocumen-*

tum quam quod peccans intulit: et quare.

XXXIII. *Rejicitur sententia de proportione harmonica in pœnis.*

XXXIV. *Minui pœnam ex caritate nisi major caritas obstet.*

XXXV. *Facilitas peccandi quomodo ad pœnam incitet: item consuetudo peccandi quomodo ad pœnam incitet, aut ab ea retrahat.*

XXXVI. *Clementiæ usus ad pœnas minuendas.*

XXXVII. *Ad superiores locos referuntur quæ Hebræi et Romani in pœnis spectari volunt.*

XXXVIII. *De bello ad pœnam.*

XXXIX. *An justum sit bellum ob delicta inchoata, distinctione explicatur.*

XL. *An reges et populi bellum recte inferant ob ea quæ contra jus naturæ fiunt, non tamen adversus ipsos ipsorumve subditos, explicatur, rejecta sententia statuente naturaliter ad pœnam exigendam requiri jurisdictionem.*

XLI. *Discernendum jus naturæ a moribus civilibus late receptis:*

XLII. *Et a jure divino voluntario non omnibus cognito.*

XLIII. *In jure naturæ discernenda manifesta a non manifestis.*

XLIV. *An ob delicta in Deum bellum suscipi possit.*

XLV. *Notitiæ de Deo maxime communes quæ, et quomodo primis decalogi præceptis indicentur.*

XLVI. *Qui has primi violant puniri posse.*

XLVII. *Non item alios, quod ostenditur argumento legis Hebrææ.*

XLVIII. *Bella juste non inferri iis, qui Christianam religionem amplecti nolunt:*

XLIX. *Juste inferri iis, qui Christianos ob solam religionem crudeliter tractant:*

L. *Non etiam his, qui circa legis divinæ interpretationem hallucinantur: quod auctoritatibus et exemplis illustratur.*

LI. *At illis juste, qui in Deos quos putant impii sunt.*

I. 1 SUPRA cum de causis ex quibus bella suscipiuntur agere cœpimus, facta diximus duplici modo considerari, aut ut reparari possunt, aut ut puniri. Priorem partem jam absolvimus. Superest posterior quæ est de pœnis: quæ res eo diligentius tractanda est nobis, quod origo ejus et na-

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CHAPTER XX. *Of Punishments.*

I. 1 When above we began to speak of the causes for which wars are undertaken, we said that facts might be considered in two ways, either with a view to reparation, or to punishment. We have now finished the former part of the subject, and proceed to the latter, Punishment. And this must be the more carefully treated

tura minus intellecta multis errationibus causam dedit. [1] Est autem pœna generali significatu *Malum passionis, quod infligitur ob malum actionis.* Nam quanquam pro pœna quibusdam injungi opera quædam solent, ea tamen opera spectantur tantum quæ molesta sunt, atque ideo ad passiones sunt referenda. Quæ vero incommoda patiuntur aliqui ob morbum contagiosum, aut corpus mutilum, aut alias impuritates, quales multæ exstant in lege Hebræa, puta arceri cœtibus aut functionibus, proprie pœnæ non sunt, quanquam ob similitudinem quandam et per abusionem eo vocabulo appellantur.

2 Inter ea vero quæ natura ipsa dictat licita esse et non iniqua, est et hoc, ut qui male fecit malum ferat, quod antiquissimum et Rhadamantheum jus vocant philosophi, ut alibi Pag. 601 B. diximus. Spectat eodem dictum Plutarchi libro de exilio: τῷ Θεῷ ἕπεται δίκη τῶν ἀπολιπομένων τοῦ θείου νόμου τιμωρὸς, ᾗ χρώμεθα πάντες ἄνθρωποι φύσει πρὸς πάντας ἀνθρώπους, ὥσπερ πολίτας· *justitia Deum comitatur, ultrix in eos qui adversus legem divinam delinquunt: qua omnes homines natura utimur adversus omnes homines ut cives.* [a] Plato dixit, In Eutyph. Tom. I. p. 8 D. ἐκεῖνο οὐδεὶς οὔτε θεῶν οὔτ' ἀνθρώπων τολμᾷ λέγειν ὡς οὐ τῷ γε ἀδικοῦντι δοτέον δίκην· *nec Deorum nec hominum*

[1] In toto isto capite perpetuo conferendus PUFENDORFIUS *De Jure Nat. et Gent.* Lib. VIII. c. 3. cum Notis nostris, præsertim alterius Editionis. *J. B.*

[a] *Plato*] Verba ejus sic posuit Irenæi interpres libro III. c. XIV. *Et Deus quidem, quemadmodum et vetus sermo est, initium et medietates omnium quæ sunt habens, recte perficit, secundum naturam circumiens: hunc autem semper consequitur justitia ultrix in eos, qui deficiunt a lege divina.* (Cap. 41. vulg. 25. divis.

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by us, because its origin and nature, not well understood, have given rise to many errors.

Punishment, in its general signification, is *An Evil of suffering which is inflicted on account of* (ob) *an evil of doing.* For though labour [not pain] may be the sentence of persons as a punishment, yet such labour is considered as it is disagreeable, and therefore is a sort of suffering. But the inconveniences which some persons have to suffer on account of an infectious disease [Lev. xiii.], or a mutilation of the body [Deut. xxiii. 1], or other uncleanness [Lev. xv.]; such as, to be excluded from public assemblies, or from certain functions, are not properly punishments; although on account of a certain resemblance, and by an abuse of language, they may be called by that name.

2 Among the things which nature herself dictates as lawful and not unjust, this stands; that he who has done evil should suffer

quisquam hoc dixerit, injuste agenti non luendam pœnam. Et Hierax justitiam ex parte hac tanquam nobilissima definiebat *τιμωρίας ἀπαίτησιν παρὰ τῶν προηδικηκότων, pœnæ exactionem ab iis qui priores læsere*, et Hierocles *ἰατρικὴν πονηρίας, malitiæ medicatricem.* [b]Lactantii dictum est: *Non exiguo falluntur errore, qui censuram sive humanam sive divinam acerbitatis et malitiæ nomine infamant, putantes nocentem dici oportere qui nocentes afficit pœna.*

Apud Stob. *Serm.* ix.

Pag. 124.

De Ira Dei, ii. 17.

3 Quod vero diximus pœnæ, quæ proprie ita nominatur, omnino hoc inesse ut delicto reddatur, notatum et Augustino est, qui dixit: *omnis pœna, si justa est, peccati pœna est:* quod ad pœnas etiam quæ a Deo irrogantur pertinet, quanquam in illis interdum ob humanam ignorantiam, ut idem scriptor loquitur, *latet culpa ubi non latet pœna.*

1 *Relect.* (seu *Retract.*) c. 9.

II. 1 Sed an ad assignatricem, an vero ad expletricem justitiam pœna pertineat, diversi diversum sentiunt. Quidam enim quia qui plus peccavit, gravius, qui minus, levius puniuntur, et quia pœna quasi a toto parti datur, ideo ad assignatricem justitiam pœnas referunt.

Sed quod primum illi ponunt, assignatricem justitiam toties locum habere, quoties inter terminos plures duobus insti-

Massuet.)

[b] *Lactantii dictum est*] Convenit huc et illud Belisarii apud Procopium *Vandal.* I. *πρῶτον δ' ἂν τοῦ δικαίου γένοιτο γνώρισμα, ἡ τῶν ἀδίκως ἀνῃρηκότων ποινή· Primum justitiæ documentum erit, pœna exacta de injustis interfectoribus.* (Cap. 12.) Adde Agathiam Lib. v. ubi de Anatolio. (Cap. 2.)

evil: which the philosophers call the ancient and Rhadamanthean law, as we have elsewhere said [I. II. 3.] So Plutarch, Plato. [See.] So Hierax defined justice by this as its noblest element; and Hierocles called it *the medicine of wickedness.* So Lactantius.

3 And this characteristic of Punishment, that it is the return for transgression, is noticed by Augustine; [see]; which belongs also to punishments inflicted by God; though in these sometimes it appears, through human ignorance, as he says, that *the transgression is hid while the punishment is apparent.*

II. 1 Whether Punishment belongs to attributive or to expletory justice there are different opinions. For inasmuch as those who transgress more gravely are more heavily punished, and those who sin less gravely, more lightly; and because punishment is assigned by the whole to a part, therefore they ascribe punishment to attributive justice.

But the principle on which they proceed, that attributive justice

tuitur æqualitas, verum non esse in principio operis hujus ostendimus: deinde quod magis nocentes gravius, minus nocentes levius puniuntur, id per consequentiam duntaxat evenit, non quod hoc primo ac per se spectetur. Nam primo ac per se spectatur [c]æqualitas inter culpam et pœnam: de qua

1 *Sat.* iii. 78, 79. Horatius:

> Cur non
> Ponderibus modulisque suis ratio utitur, ac res
> Ut quæque est ita suppliciis delicta coërcet?

Et alibi (Ibid. vers. 117, 118):

> Adsit
> Regula peccatis quæ pœnas irroget æquas,
> Nec scutica dignum horribili sectere flagello.

xv. 2, 3. CV. Eodem spectat lex divina Deuteron. xxv. et *Novella* Leonis.

2 Sed nec alterum quod illi ponunt magis verum est, pœnas omnes venire ex toto ad partem, quod ex his quæ dicenda sunt apparebit. Tum vero ostensum a nobis supra est, veram justitiæ assignatricis rationem nec in tali æqualitate, nec in

[c] *Æqualitas inter culpam et pœnam*] Seneca *de Ira* II. 6. *Iniquus erit si æqualiter irascetur inæqualibus.* Tacitus *Annalium* III. (cap. 50.) *Sin flagitia et facinora sine modo sunt, suppliciis et remediis principis moderatio, majorumque et vestra exempla temperant, et vana a scelestis, dicta a maleficiis differunt: est locus sententiæ, per quam neque huic delictum impune sit, et nos clementiæ simul ac severitatis non pœniteat.* Ammianus libro XXVIII. c. 1. *Oraturi ne delictis supplicia sint grandiora.* Scholiastes ad Horatium, (init. *Sat.* III. Lib. I.) *Si in minimis peccatis etiam maximæ pœnæ consumuntur, restat ut maxima peccata aut maneant impunita, aut nova supplicia adinveniantur.* Lex Wisigothorum libro XII. tit. iii. cap. 1. *Nam quædam leges sicut culparum habent diversitates, non ita discretas in se continent (retinent) ultiones, sed permixta scelera transgressorum ad unius permittuntur legis pœnale judi-*

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obtains wherever an equality is introduced between more than two terms, we have proved, in the beginning of this work, not to be true [I. i. 8]. And in the next place, that greater offenders are punished more severely, smaller ones more lightly, that only happens by consequence, and is not what is looked to in the first place and *per se.* For the thing first looked at is the equality between the offense and the punishment, as Horace says. [See.] And in like manner Deut. xxv. 2, 3; and the *Novella* of Leo.

2 Nor is their other principle more true, that all punishments come from the whole to a part, as will appear by what we have hereafter to say. But further: it is shewn above that the true notion of attributive justice does not properly consist, either in such equality, or in the process from the whole to a part; but in taking account of that claim which does not include right strictly taken, but gives occa-

processu a toto ad partem proprie consistere, sed in habenda ratione ejus aptitudinis, quæ jus stricte dictum in se non contineat, sed occasionem ei det. Quanquam vero is qui punitur aptus aut dignus esse debet puniri, non eo tamen id spectat ut ipsi accedat aliquid, quod assignatrix justitia postulat. Nec tamen qui expletricem justitiam, quam vulgo commutatricem vocant, in pœnis exerceri volunt, magis se explicant. Ita enim negotium hoc considerant, quasi nocenti aliquid reddatur, sicut in contractibus fieri solet. Decepit eos vulgaris locutio, qua dicimus pœnam deberi ei qui deliquit, quod plane est *ἄκυρον*: nam cui proprie debetur aliquid, is in alterum jus habet. Sed cum deberi alicui pœnam dicimus, nihil volumus aliud quam æquum esse ut puniatur.

3 Verum tamen est in pœnis primo ac per se exerceri expletricem justitiam, quia scilicet qui punit, ut recte puniat, jus habere debet ad puniendum, quod jus ex delicto nocentis nascitur. Atque hac in re est aliud [d] quod ad contractuum na-

cium. Nec secundum modum culpæ modus est adhibitus pœnæ, cum major minorque transgressio non unius debeat mulctationis prædamnari supplicio: præsertim cum dominus in lege sua præcipiat: pro mensura peccati, erit et plagarum modus. Vide infra hoc capite, § xxviii. et xxxii. et Lib. III. c. xi. §. [In loco TACITI legendum mihi videtur: *Sin flagitia et facinora,* ETSI *sine modo sunt* &c. alias non constat sensus, quem nec Freinshemius in paraphrasi, nec alii interpretes, satis expediunt: et facile a Librariis omitti potuit particula *etsi,* propter sequentem *sine.* Qua de re judicium penes Criticos esto. *J. B.*]

[d] *Quod ad contractuum naturam accedit*] Sæpe hoc notat Servius, ad IV. *Æneidos,* (vers. 695) *nam qui excedunt delinquendi modum, ipsi sibi pœnam sanciunt.* Ibidem (in vers. 699) *damnare est debito liberare, unde* DAMNABIS TU QUOQUE VOTIS. Ad X. *Æneidos,* (vers. 32) LUANT PECCATA: *luant, id est,*

sion to it. And although he who is punished ought to have a moral claim, or to be worthy, to be punished, still that does not go to prove that he has such a quality as attributive justice requires.

But neither do they who hold that expletory, or, as it is commonly called, commutatory justice, is exercised in Punishment, explain themselves better. For they regard the transaction as if something were paid to the offender, as is commonly done in contracts. They are deceived by the vulgar expression in which we say that Punishment is *the due* of him who has transgressed; which is plainly an improper expression, for he to whom anything is properly a due, has a right over another. But when we say that punishment is any one's due, we mean nothing else than that it is just that he should be punished.

3 Still, however, it is true, that in punishment the justice which is exercised is in the first place and *per se* expletory justice: because he

turam accedit: quia sicut qui vendit, etiamsi nihil peculiariter dicat, obligasse se censetur ad ea omnia quæ venditionis sunt naturalia, ita qui deliquit sua voluntate se videtur obligasse pœnæ, quia crimen grave non potest non esse punibile, ita ut qui directe vult peccare, per consequentiam et pœnam mereri

L. Imperat. 34. D. de jur. fisc. L. ult. C. ad l. Jul. Maj.

voluerit: quo sensu Imperatores cuidam aiunt, [1]*ipse te huic pœnæ subdidisti*, et qui sceleratum capiunt consilium sua mente [2]jam tum puniti, id est, sua voluntate pœnæ meritum

Ann. xii. 53.

contraxisse dicuntur: et Tacito mulier quæ se servo conjunxisset in servitutem sui [3]consensisse dicitur, quia id pœnæ in tales erat constitutum.

Cap. 2.

4 Michaël Ephesius ad quintum *Nicomachiorum* Aristotelis: *γέγονε τρόπον τινὰ δόσις καὶ λῆψις, ὅ ἐστι τὸ συναλλάσσειν· λαβὼν γὰρ χρήματα ἢ ἄλλο τι κλέψας, δέδωκεν ἀντ' ἐκείνων εὐθύνας·* *est hic quodammodo datio et acceptio, in quibus consistit natura contractuum: nam qui res aut*

absolvant. Dicimus autem et luo pœnam: sed melius est hic peccatum: nam peccatum solvitur pœna: qui enim crimini tenetur obnoxius, pœna eum a pristina liberat obligatione: Contra, luo pœnam, non procedit, quasi pœna solvatur. Auctoritas tamen ista confundit licenter, more quo solet poni vel a sequenti quod præcedit, vel a præcedenti quod sequitur. Idem locutio sacræ scripturæ frequens indicat. Nam, ut Tertullianus ait *de Oratione*, (cap. 7) *Debitum in scripturis delicti figura est, quod perinde judicio debeatur, et ab eo exigatur.* Chrysostomus oratione de terræ motu, quæ est tomo v. (Immo Tom. VI. pag. 677. *Edit. Savil.*) de divite illo agens qui Lazaro opponitur, et explicans vocem ἀπέλαβες, quæ est in illo Evangelii loco, (Lucæ xvi. 25) *ἐχρεωστοῦντο αὐτῷ τιμωρίαι, ἐχρεωστοῦντο αὐτῷ ὀδύναι· debebantur ipsi pœnæ, debebantur ipsi dolores.* Idem II. *de Pœnitentia: τὰ ἁμαρτήματα εἰς ὀφειλήματα ἀναγράφεται· peccata ad debiti genus referuntur.* [Ibi est, *ὡς ὀφειλήματα* &c. Tom. VI. pag. 771.] Augustinus III. *de libero Arbitrio: Itaque si non reddit faciendo justitiam, reddet patiendo miseriam: quia in utroque verbum*

who punishes, in order to punish rightly, ought to have a right to punish, which right arises from the delinquency of the offender. And in this matter, there is another thing which approaches to the nature of contracts; that as he who sells, although he say nothing particularly, is conceived to have obliged himself to all the things which are natural to selling; so he who has wilfully offended, seems to have obliged himself to undergo punishment; because grave crime cannot be otherwise than punishable: so that he who directly wills to offend, must also by consequence have willed to incur punishment. And in this sense, the emperors say to such a person, *You have subjected yourself to this punishment;* as those who take wicked counsels are said to have already incurred punishment in their own thoughts: and in Tacitus, a woman who had joined herself to a slave is said to have consented

aliud quid furatus est, pro eo dat pœnas. Idem posterius: *συναλλάγματα οἱ παλαιοὶ ἐκάλουν οὐ μόνον ἃ ἑκόντες συνετίθεντο πρὸς ἀλλήλους ποιεῖν, ἀλλὰ καὶ τὰ ὑπὸ τῶν νόμων ἀπηγορευμένα· contractus a veteribus appellabantur non tantum quæ mutuis conventionibus constant, sed et quæ legibus sunt vetita.* Ad Cap. 4.

III. 1 Sed hujus juris subjectum, id est, cui jus debetur, per naturam ipsam determinatum non est. Dictat enim ratio maleficium posse puniri, non autem quis punire debeat: nisi quod satis indicat natura convenientissimum esse ut id fiat ab eo qui superior est: non tamen et omnino hoc demonstret esse necessarium, nisi vox superioris eo sumatur sensu, ut is qui male egit eo ipso se quovis alio inferiorem censeatur fecisse, et quasi ex hominum censu detrusisse [f]in censum bestiarum quæ homini subjacent, quod a theologis quibusdam est proditum. Democritus: *φύσει τὸ ἄρχειν οἰκήϊον τῷ κρείσσονι,* Thom. 2, 2. quæst. 64. art. 2. et *ibi* Cajet. Apud Stob. *Serm.* 47.

illud debiti sonat. Hoc enim etiam modo dici potuit, quod dictum est: si non reddit faciendo quod debet, reddet patiendo quod debet. (Cap. 15. § 44. *Ed. Benedictin.*)

[e] *Ipse te huic pœnæ subdidisti*] Philo fine libri primi *de Vita Mosis; αὐτοὶ γάρ τοι σπεύδοντες ἁμαρτάνειν, σπεύδετε καὶ πρὸς τιμωρίας· peccare dum festinatis, ad pœnas ferendas festinatis.* (Pag. 652 D.)

[2] In omnibus Editionibus erat heic *suo merito:* sed contra lectionem omnium corporis Juris Codicum, quos quidem viderim, et præter mentem etiam Auctoris nostri, qui, dum exponit *sua voluntate*, manifesto ostendit, se legisse *sua mente:* quamquam ipse erratum non animadverterit, etiam quum in Editione ann. 1632: adderet voces sequentes *jam tum*, quæ in prima Editione desunt. *J. B.*

[3] Apud TACITUM legendum omnino, ut edidit RYCQUIUS: *Statuiturque, ut ignaro domino ad id prolapsa, in servitute: sin consensisset, pro liberta haberetur.* Vide ibi J. FR. GRONOV. Notam. Sic locus nil ad rem facit. *J. B.*

[f] *In censum bestiarum*] Sic et Moses Maimonides ad *Deut.* xxxiii.

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to her own slavery, because that was the punishment for such persons*.

4 Michael Ephesius on Aristotle illustrates this.

III. 1 Of such punishment, the subject, that is, the person *to whom* it is due, is not determined by nature itself. Nature dictates that evildoing may be punished, but not who ought to punish: except that nature sufficiently indicates that it is most suitable that it be done by one who is superior: yet not in such way as to shew that this is necessary; except the word *superior* be taken in this sense, that he who has done wrong has, by that very fact, made himself inferior to any other, and has thrust himself out of the class of men into that of the inferior brutes, as some theologians hold. See Democritus, Aristotle.

* Tacit. *Annal.* XII. 53. The passage, rightly used, is nothing to the purpose, as Barbeyrac remarks.

Politic. vii. 14. *natura evenit ut melior sequiori imperet.* Et Aristoteles ait deteriora comparata esse in usum meliorum, tam in his quæ a natura sunt, quam quæ ab arte.

2 Cui consequens est, ut saltem ab æque nocente æque nocens puniri non debeat: quo Christi sententia pertinet: *qui vestrum sine peccato est* (tali scilicet) *primum lapidem mittat*, Joh. viii. 7. Quod ideo dixit, quia eo sæculo corruptissimi erant Judæorum mores, adeo ut qui sanctissimi videri volebant, in adulteriis et similibus flagitiis volutarentur, ut videre est Rom. ii. 22. Idem ergo quod Christus dixerat, dixit et Apostolus: *quapropter inexcusabilis es, o homo, quisquis alium damnas: nam hoc ipso quod damnas alterum, te ipsum condemnas, quando eadem facis tu qui alterum damnas.* Illud Senecæ huc pertinet: *non potest ullam auctoritatem habere sententia, ubi qui damnandus est damnat.* Et alibi, [4]*faciet nos moderatiores respectus nostri, si consuluerimus nos, numquid et ipsi aliquid tale commisimus?* Ambrosius
Lib. ii. 1. apologia Davidis: *unusquisque de alio judicaturus de se ipso primum judicet, nec minora in alio errata condemnet cum ipse graviora commiserit.*

IV. 1 Altera quæstio est de fine pœnis proposito. Nam quæ diximus hactenus id duntaxat ostendunt, nocentibus injuriam non fieri si puniantur. Inde vero non sequitur omnino

[4] Præcedens locus ubinam exstet, divinare nequeo: Auctor enim neque heic, neque in Adnotationibus ad Joann. viii. 7. ubi similes congessit, ullum indicium d. t, unde investigari queat. Hic autem legitur *De Ira*, Lib. II. cap. 28. Sed post primam Editionem comperi, priorem locum non esse Philosophi, sed illius qui mentitus est nomen Senecæ, in libro *De Remediis fortuitorum*, unde Excerpta subjecta etiam Editionibus Lipsii et Gronovii; ubi facile jam est invenire hæc verba, quum Excerpta brevia sint. *J. B.*

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2 It follows, as a consequence of this, that the offender ought not to be punished by one who has offended equally, as Christ said, Joh. viii. 7, *He that is without sin among you* (that is, such sin) *let him cast the first stone.* And this he said, the Jews being very wicked and adulterous at that time, Rom. ii. 22; where the Apostle says what Christ had said. Seneca says the same; and Ambrose, in the apology of David.

IV. 1 Another question is of the End of punishment. For what has been said hitherto only proves that transgressors have no wrong done them if they are punished. But from that, it does not necessarily follow that they must be punished. Nor is it necessary; for many offenders are pardoned for many things both by God and by men, and

puniendos. Neque id verum est: multis enim nocentibus multa et Deus et homines condonant, eoque nomine laudari solent. Celebre est Platonis dictum, *οὐ γὰρ ἐπὶ κακῷ δίκη* De Leg. I. ix. p. 354 D. *γίνεται οὐδεμία·* et alibi, *οὐχ ἕνεκα τοῦ κακουργῆσαι δίδοται* Lib. xi. p. 934 A. *δίκη, (οὐ γὰρ τὸ γεγονὸς ἀγένητον ἔσται ποτὲ) τοῦ δὲ εἰς τὸν αὖθις ἕνεκα χρόνον.* Quod ita vertit Seneca: *nemo pru-* De Ira, i. 16. *dens punit quia peccatum est, sed ne peccetur. Revocari enim præterita non possunt: futura prohibentur.* Idem alibi: *ne homini quidem nocebimus quia peccavit, sed ne* Ibid. ii. 31. *peccet: nec unquam ad præteritum, sed ad futurum pœna referetur: non enim irascitur, sed cavet.* Apud Thucydidem Diodorus de Mitylenæis ad Athenienses verba faciens: *ἤν τε* Lib. iii. 44. *γὰρ ἀποφήνω πάνυ ἀδικοῦντας αὐτοὺς, οὐ διὰ τοῦτο καὶ ἀποκτεῖναι κελεύσω, εἰ μὴ ξυμφέρον· ut maxime illos injuste egisse pronuntiem, non et interficiendos censebo, nisi id expediat.*

2 Sed hæc in hominibus punientibus vera sunt: nam homo ita homini alteri ipsa consanguinitate alligatur, [h]ut nocere ei non debeat, nisi boni alicujus consequendi causa. In Deo alia res est, ad quem Plato dictas sententias male extendit. Dei Gorg. p. 525 B. enim actiones niti possunt ipso summi dominii jure, præsertim ubi meritum hominis speciale accedit, etiamsi finem nullum sibi proponant extra ipsas: et ita Hebræi quidam explicant illud Mos. Maim. in Direct. dub. ii. 13. et Rab. Imm. ad Prov. xvi. 4.

[g] *Nunquid et ipsi tale aliquid commisimus*] Pertinet huc et Ambrosii locus sermone xx. in *Psalmum, Beati immaculati*, ad versiculum, *Miserationes tuæ domine*, (Serm. xx. c. 4. p. 1593 c.) citatus causa III. quæstione vii. (c. 4.) item Cassiodori VI. 21.

[h] *Ut nocere ei non debeat nisi boni alicujus consequendi causa*] Cassiodorus [aut potius Petrus Blesensis] *de Amicitia: quod si manus una casu aliquo forte lædat alteram, illa quæ læsa est non repercutit, nec se erigit in vindictam.*

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these are often praised on that account. Plato's saying is celebrated (in his Laws), which Seneca translates, *No wise man punishes because wrong has been done, but in order that wrong be not done:* and so elsewhere; and in Thucydides.

2 This is true in human punishments; for men are so bound together by their common nature, that they ought not to do each other harm, except for the sake of some good to be attained. In God the case is different, and Plato does ill in extending this doctrine to him. For the actions of God may depend on his right of Supreme Authority, especially when there is some special merit [or demerit] of man in addition, although he propose to himself no extrinsic end: and so the Hebrew commentators explain Prov. xvi. 4: *The Lord hath made*

Solomonis quod ad hanc materiam pertinet: כל פעל יהוה למענהו וגם רשע ליום רעה Ut sensus sit, *res singulas Deus facit propter ipsas, etiam impium ad diem malum:* id est, etiam tum cum impium punit, non alio fine hoc facit quam ut puniat. Quamquam, etiamsi receptiorem sequamur interpretationem, eodem res recidet; ut dicatur Deus fecisse omnia propter se, id est, jure summæ libertatis et perfectionis, nihil extra se quærens aut respiciens: sicut Deus dicitur αὐτοφυής, quia non est natus ex aliquo. Certe pœnas quorundam valde perditorum a Deo non ob aliud exigi sacra verba testantur,
Deut. xxviii. 63. *Esai.* i. 24. *Prov.* i. 26. cum dicunt eum voluptatem capere ex ipsorum malo, subsannari atque irrideri impios a Deo. Tum vero et extremum judicium, post quod nulla exspectatur emendatio, imo et in hac vita pœnæ quædam inconspicuæ ut obduratio, verum esse, quod contra Platonem dicimus, evincunt.

3 At homo cum hominem sibi natura parem punit, aliquid
Thom. 2. 2. quæst. 108. Silv. *Verb. Vind.* sibi debet habere propositum. Et hoc est quod aiunt scholastici, non debere in malo cujusquam acquiescere ulciscentis ani-
Pag. 463 B. mum. Sed et ante ipsos Plato in *Gorgia*, eos qui quemquam morte puniunt, aut exilio, aut multa, non hoc βούλεσθαι

[i] *Seneca*] Ejusdem est libro eodem *de Ira* secundo, capite xii. *Exsequar, quia oportet, non quia dolet.* [Immo Lib. I.]

[k] *Quam homo cum bestiis habet communem*] Inde ista Homerica (*Iliad.* IV. 23) χόλος δέ μιν ἄγριος ᾕρει· *illum fera prenderat ira.* Item (*Iliad.* IX. 625):

Ἄγριον ἐν στήθεσσι θέτο μεγαλήτορα θυμόν.
Efferat ipse animum magnum sibi pectore in imo.

Item (*Ibid.* vers. 492):

Ἀλλ' Ἀχιλεῦ δάμασον θυμὸν μέγαν.
Magnum animum sed Achille doma.

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all things for himself, yea, even the wicked for the day of evil. But even if we take the more common interpretation, it comes to the same thing: that God has done all things by the right of his supreme liberty and perfection, seeking and requiring nothing beyond himself; as he is said to be self-existent. Certainly the words of Scripture testify, that the punishments of very wicked men are inflicted on this account, when they speak (Deut. xxviii. 63) of God's *rejoicing over them to destroy them:* of his mocking and laughing at them (Prov. i. 26. Isai. i. 24). And that what we have said against Plato is true, is proved by the last judgment, after which no amendment is to be expected: as also by the infliction of some inconspicuous punishment, as the hardening of the sinner's heart, in this life.

3 But man, when he punishes a being of the same nature as himself, ought to have some object in view. And this is what the Schoolmen say, that the mind of him who inflicts punishment ought not to

ἁπλῶς, simpliciter velle, sed *boni alicujus causa, ἕνεκα τοῦ ἀγαθοῦ*. Et [i]Seneca ad vindictam veniendum *non quasi dulce sit vindicare, sed quasi utile*. Etiam Aristoteles septimi de republica capite XIII. ait, quædam esse honesta simpliciter, quædam ob aliquam necessitatem: et posterioris exemplum ponit in pœnarum exactione. *De Ira*, ii. 32.

V. 1 Quod ergo a mimo dictum est: Publ. Syr. v. 340.

Læso doloris remedium inimici dolor:

et a Cicerone, dolorem pœna mitigari, Plutarcho ex Simonide; Γλυκὺ καὶ οὐ σκληρὸν ὥσπερ ἀλγοῦντι τῷ θυμῷ καὶ φλεγμαίνοντι θεραπείαν καὶ ἀναπλήρωσιν προσφέρειν: congruit quidem ei naturæ [k]quam homo cum bestiis habet communem: est enim ira ut in bestiis ita in homine ζέσις περικαρδίου αἵματος δι' ὄρεξιν ἀντιλυπήσεως, ut recte definit Eustratius, [l]*fervor sanguinis circa cor ob appetitum reponendi doloris*, qui appetitus adeo per se caret ratione, ut sæpe feratur in ea, quæ non læserunt, ut in fœtus feræ quæ læsit; [m]aut in sensu carentia, ut in lapidem quo ictus est canis. At talis appetitus in se spectatus [n]non convenit parti rationali, cujus est imperare affectibus; ac proinde nec juri naturæ, quia id est dicta- *Orat. pro Cæcin.* c. 12. *Vit. Arat.* p. 1048 E. *In Ethic. Nic.* vi. 1.

[l] *Fervor*] Inde *σβέσσαι χόλον, bilem extinguere*, apud Homerum [*Iliad.* IX. 674.]

[m] *Aut in sensu carentia*] Seneca *de Ira*, libro II. c. 26. *His irasci quam stultum est, quæ iram nostram nec meruerunt nec sentiunt.* Brasiliani, feri homines, de ferro, ita ut de homine se vindicant. [Vide JOANN. LERIUM, *Itin. Brasil.* p. 163.]

[n] *Non convenit parti rationali, cujus est imperare affectibus*] Vide quæ in hanc rem Seneca *de Ira* libro I. c. 5.

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rest in the evil inflicted on any one. Plato had said the same before. [See.] And Seneca; so also Aristotle.

V. 1 Therefore what has been said by various writers, that the pain of the offender is a remedy of the pain of the injured person, (Publius Syrus, Plutarch, Cicero,) does indeed agree with the nature which man has in common with brutes; for anger is, in brutes as in man, a heat of the blood arising from the desire of revenge, which appetite is irrational: so that it is often directed against objects which have done them no harm, as against the offspring of the creature which did the harm, or against things which have no sense, as in a dog against the stone which hit him. But such an appetite, considered in itself, does not correspond to our rational part, of which the office is to control the passions; and consequently, not to Natural Law, because that is the dictate of our rational and social nature as such. But reason dictates to man that nothing is to be done by him so as to

tum naturæ rationalis ac socialis qua talis est. Dictat autem ratio homini nihil agendum quo noceatur homini alteri, nisi id bonum aliquod habeat propositum. In solo autem inimici dolore, ita nude spectato, nullum est bonum nisi falsum et imaginarium: ut in divitiis supervacuis, multisque aliis rebus ejusmodi.

2 Atque hoc sensu ultionem improbant in hominibus non Christiani modo doctores, [o]sed et philosophi, ut Seneca: *Inhumanum verbum est et quidem pro justo receptum ultio, et a contumelia non differt nisi ordine. Qui dolorem regerit, tantum excusatius peccat.* Imo, si Maximo Tyrio credimus, *ὁ τιμωρῶν τοῦ προϋπάρξαντος ἀδικώτερος, iniquior est qui se ulciscitur eo qui prior nocuit.* Musonius, *id,* ait, *cogitare quomodo quis remordeat mordentem, et nocenti noceat, feræ est, non hominis.* Apud Plutarchum Dion is qui sapientiam Platonicam in actus civiles convertit: *τὸ ἀντιτιμωρεῖσθαι τοῦ προαδικεῖν νόμῳ δικαιότερον ὡρίσθαι, φύσει γινόμενον ἀπὸ μιᾶς ἀσθενείας· ultionem legis arbitrio justiorem censeri illata injuria: at si natura spectetur ex eodem animi morbo nasci.*

Lib. ii. *de Ira*, c. 32.

Diss. ii. p. 24, 26.

Apud Stob. *Serm.* 19.

Vit. Dion. p. 979 A.

3 Pugnat ergo cum natura hominis in hominem agentis alieno dolore, qua dolor est, satiari. Atque adeo quo hominum quisque minus valet rationis usu, eo ad vindictam est pronior. Juvenalis (*Sat.* XIII. 180, et seqq.):

> At vindicta bonum vita jucundius ipsa.
> [p]Nempe hoc indocti, quorum præcordia nullis

o *Sed et Philosophi*] Plato *Gorgia.* Vide de eo Theodoretum, libro XX. curationis.

p *Nempe hoc indocti*] Seneca *de Ira* I. 13. *At qui iracundissimi infantes senesque et ægri sunt, et invalidum omne natura querulum est.*

q *Nemo magis gaudet quam femina*] Terentius *Hecyra* (III. i. 30):

> Pueri inter sese quam pro levibus noxiis iras gerunt.
> Quapropter? quia enim qui eos gubernat animus, infirmum gerunt.
> Itidem mulieres sunt ferme, ut pueri, levi sententia.

Ammianus Marcellinus libro XXVII.

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harm another man, except it have some good purpose. But in the pain of an enemy, so nakedly regarded, there is no good, but a false and imaginary one; as in superfluous riches, and many other things of that kind.

2 And in this sense revenge is condemned, not only by Christian doctors, but also by heathen philosophers. So Seneca, Maximus Tyrius, Musonius. In Plutarch, Dio, who converted the Platonic wisdom into acts, says that vengeance proceeds from the same disease of the soul as injurious aggression. [Sec.]

Interdum aut levibus videas flagrantia causis:
Quantulacunque adeo est occasio, sufficit iræ.
Chrysippus non dicet idem, nec mite Thaletis
Ingenium, dulcique senex vicinus Hymetto,
Qui partem acceptæ sæva inter vincla cicutæ
Accusatori nollet dare. Plurima felix
Paulatim vitia atque errores exuit omnes,
Prima docet rectum sapientia: quippe minuti
Semper et infirmi est animi exiguique voluptas
Ultio: continuo sic collige, quod vindicta
[q]Nemo magis gaudet quam femina.

Eodem sensu Lactantius: *imperiti et insipientes siquando accipiunt injuriam cæco et irrationabili furore ducuntur, et iis qui sibi nocent vicem retribuere conantur.* Lib. vi. 18.

4 Liquet ergo ab homine hominem non recte puniri tantum puniendi causa: quæ ergo utilitates rectam faciant pœnam videamus.

VI. 1 Pertinet autem huc pœnarum partitio, quæ est apud Platonem Gorgia, et Taurum philosophum ad eum locum cujus verba Gellius recitat libro VI. cap. XIV. nam partitiones istæ ex fine desumtæ sunt, nisi quod cum duos fines Plato posuisset, emendationem et exemplum, tertium addidit Taurus [r]τιμωρίαν, quam Clemens Alexandrinus definit, κακοῦ ἀνταπόδοσιν εἰς τὸ τοῦ τιμωροῦντος συμφέρον ἀναφερομένην· *mali retributionem quæ ad exigentis utilitatem refertur.* Pædag. i. 8. Aristoteles, qui omissa pœna exemplari, hanc solum speciem cum emendatione ponit, adhiberi eam dicit, τοῦ ποιοῦντος Rhet. i. 10.

de Ira sic loquitur: *hanc esse ulcus animi diuturnum, interdumque perpetuum, prudentes definiunt, nasci ex mentis mollitie consuetum, id asserentes argumento probabili, quod iracundiores sunt incolumibus languidi, et feminæ maribus, et juvenibus senes, et felicibus ærumnosi.* (Cap. 7. pag. 536. *Ed. Vales. Gron.*)

[r] Τιμωρίαν] Tria hæc, *νουθεσίαν, τιμωρίαν, κόλασιν*, emendationem, satisfactionem, exemplum, etiam Chrysostomus ponit in 1 ad Corinth. xi. 32. (Tom. III. pag. 424, 425. *Ed. Savil.*)

3 It is therefore contrary to the true nature of man acting on man, to find satisfaction in the pain of another person, as pain. See Juvenal on Revenge. [Sat. XIII. 180.] So Lactantius.

4 Therefore man is not rightly punished by man merely for the sake of punishing: let us see then what utility makes punishment right.

VI. 1 To this subject pertains the division of punishment stated in Plato's *Gorgias*, and Taurus on the place, as quoted by Gellius: which division is taken from the end of punishment; except that while

ἕνεκα ἵνα ἀποπληρωθῇ, *exigentis causa ut ei satisfiat.* Plutarchus quoque eam non omisit, cum dixit: αἱ ὑπὸ χεῖρα τοῖς τολμωμένοις ἀπαντῶσαι τιμωρίαι καὶ τῶν μελλόντων εἰσὶν ἐπισχέσεις ἀδικημάτων, καὶ μάλιστα τὸ παρηγοροῦν τοὺς πεπονθότας ἔνεστιν αὐταῖς· *quæ facinus statim subsequuntur pœnæ, non modo in posterum inhibent delinquendi audaciam, sed et injuria affectos maxime consolantur.* Et
Ethic. Nic. v. 7, 8. hæc proprie est quam idem Aristoteles refert ad δικαιοσύνην συναλλακτικὴν, *justitiam* quam ipse *commutatricem* vocat.

2 Sed subtilius ista examinanda sunt. Dicemus ergo, in pœnis respici aut utilitatem ejus qui peccarit, aut ejus cujus intererat non peccatum esse, aut indistincte quorumlibet.

VII. 1 Ad horum trium finium primum pertinet pœna, quæ philosophis modo νουθεσία, modo κόλασις, modo παραί-
L. 20. *D. De Pœn.* νεσις dicitur, Paulo Jurisconsulto pœna quæ constituitur in
De Leg. xi. p. 933 E. emendationem, σωφρονισμοῦ ἕνεκα Platoni, Plutarcho ἰατρεία
De sera Num. vind. p. 550 A. 559 F. ψυχῆς, *animi medicatrix,* quæ hoc agit ut eum qui peccavit reddat meliorem medendi modo, qui est per contraria. Nam quia omnis actio, præsertim vero deliberata ac frequens, quandam gignit sui proclivitatem, quæ adulta habitus dicitur, ideo vitiis, quamprimum fieri potest, adimenda est illecebra, quod fieri rectius nequit, quam si [s] dolore quodam subsequente sapo-
De habit. doct. Platon. p. 21. rem amittant dulcedinis. Platonici recitante Apuleio: *gravius et acerbius est omni supplicio si noxio impunitas differatur,*
Ann. iii. 54. *nec hominum interim animadversione plectatur.* Apud Tacitum est: *corruptus simul et corruptor æger et flagrans ani-*

[s] *Dolore quodam subsequente*] Seneca *de Ira* I. 5. *quemadmodum quædam hostilia detorta, ut corrigamus, adurimus, et adactis cuneis, non ut frangamus, sed ut explicemus, elidimus: sic ingentia vitia prava dolore corporis animique*

Plato mentions two ends, *amendment* and *example,* Taurus adds a third, *retribution.* So Clemens Alexandrinus. Aristotle takes the two latter ends. Plutarch recognizes retribution. And this is properly what Aristotle refers to *synallactic* justice.

2 But this must be more minutely examined. We shall say then that in punishment is regarded either the utility of the offender, or of him who suffers by the offense, or of persons in general.

VII. 1 To the first of these ends, pertains punishment which is called reformatory: of which Paulus, Plutarch, and Plato speak; the object of which is to make a better man of the offender. For as repeated acts beget habits, vices are to be cured by taking away the pleasure which they bring, and putting pain for their sweetness. So

mus haud levioribus remediis restinguendus est, quam libidinibus ardescit.

2 Punitionem quæ huic fini inservit natura cuivis esse licitam, qui judicio valeat, et ejusmodi generis aut paribus vitiis non teneatur, ex ea quæ verbis fit castigatione apparet. Thom. 2, 2. quæst. 33. 3.

> Amicum castigare ob meritam noxiam,
> Immune est facinus, verum in ætate utile.

Plaut. *Trin.* i. 1. 1.

In verberibus vero et aliis quæ coactionis aliquid continent, discrimen [t] inter personas quibus id liceat aut non liceat non est factum a natura (neque enim potuit, nisi quod ratio parentibus in liberos ejus juris usurpationem pro affectus necessitudine peculiariter commendat) sed a legibus, quæ communem illam generis humani propinquitatem, vitandarum rixarum ergo, ad proximos affectus restrinxerunt, ut videre est tum alibi, tum Codice Justinianeo, titulo de emendatione propinquorum: quo et illud pertinet Xenophontis ad milites: *εἰ μὲν ἐπ' ἀγαθῷ ἐκόλασα τινὰ, ἀξιῶ ὑπέχειν δίκην, οἵαν καὶ γονεῖς υἱοῖς καὶ διδάσκαλοι παισί. καὶ γὰρ ἰατροὶ τέμνουσι καὶ καίουσιν ἐπ' ἀγαθῷ· si quem ut podessem verberavi, pœnam debere me profiteor, qualem parentes filiis, et magistri discipulis. Nam et medici ægrotum suo ipsius bono urunt ac secant.* De Exped. Cyr. v. 8. §8. Lactantius libro VI: *Jubet Deus ut manus nostras super minores semper habeamus, hoc est, ut peccantes eos assiduis verberibus corrigamus, ne amore inutili et indulgentia nimia educentur ad malum et ad vitia nutriantur.* Cap. 19. n. 8.

corrigimus. Idem *de Ira* II. 27. *In his erunt boni magistratus, parentesque, et judices, quorum castigatio sic accipienda est, quomodo scalpellum, et abstinentia, et alia quæ profutura torquent.*

[t] *Inter personas quibus id liceat*] Vide Augustinum *Enchiridio* cap. 72.

Plato and Tacitus.

2 That punishment which answers such an end, is lawful to every one of sound judgment, who is not implicated in that or the like vices, appears from what is said of verbal castigation. It is *an unofficial Duty.* [See Plautus.] In stripes and inflictions, which contain anything of compulsion, the difference between the persons to whom it is, and to whom it is not lawful, is not made by nature, (nor could be, except that nature commends to parents the office of correcting their children,) but by the laws, which, for the sake of avoiding quarrels, have restricted that general relation [of correctors and corrected] to the nearest family relatives, as we may see in the Codex of Justinian, Title *De emendatione propinquorum.* So also in Xenophon, Lactantius.

3 Hoc vero puniendi genus ad mortem pertingere non potest, nisi eo modo quem reductivum vocant, quo negationes reducuntur ad rerum oppositarum genera. Nam sicut Christus
Marc. xiv. 21. dixit melius quibusdam futurum fuisse, id est, non tam male, si nati nunquam essent, ita ingeniis insanabilibus melius est, id est, minus est malum emori quam vivere, quando certum est vivendo pejores evasuros. De talibus Seneca loquitur,
De Ira, i. 5. Vid. et c. 16. cum ait, interdum ut pereant interesse pereuntium. Jambli-
Protrep. c. 2. chus: *καθάπερ τῷ ὑποπύῳ βέλτιον τὸ καίεσθαι τοῦ διαμένειν, οὕτω καὶ τῷ μοχθηρῷ τὸ τεθνάναι τοῦ ζῆν· quomodo suppurato melius est uri quam sic manere, ita improbo*
De sera num. vind. p. 551 E. *mori quam vivere.* Talem vocat Plutarchus *ἑτέροις γε πάντως βλαβερὸν, αὑτῷ τε βλαβερώτατον, ceteris noxium quidem, at sibi maxime.* Et Galenus cum morte puniri homines dixisset, primum ne vivi noceant, deinde ut alii pœnæ metu deterreantur, addit: *καὶ τρίτον ἐστὶ καὶ αὐτοῖς ἐκείνοις ἄμεινον τεθνάναι, διεφθαρμένοις οὕτω τὴν ψυχὴν ὡς ἀνίατον ἔχειν τὴν κακίαν· tertio et ipsis expedit mori ita corruptis animo ut ad sanitatem perduci nequeant.*

1 *Joh.* v. 16. 4 Sunt qui hos ipsos esse putant quos Johannes Apostolus

[a] *Ad mortem peccare*] Τοὺς ἀνίατα νοσοῦντας: morbo tentos insanabili hos vocat Chrysostomus 2 Corinth. xiii. 9. (Tom. vi. pag. 702.) Julianus secundo libro *de Constantio: διττῶν δὲ ὄντων τῶν ἁμαρτημάτων καὶ τῶν μὲν ἀποφαινόντων ἐλπίδας ἀμείνους, καὶ οὐ πάντῃ τὴν θεραπείαν ἀπεστραμμένων, τῶν δὲ ἀνίατα πλημμελούντων· τούτοις δὲ οἱ νόμοι θάνατον λύσιν τῶν κακῶν ἐπενόησαν, οὐκ εἰς τὴν ἐκείνων μᾶλλον, εἰς δὲ τὴν τῶν ἄλλων ὠφέλειαν· cum duo*

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3 But this kind of punishment cannot extend as far as death, except in what they call a reductive way, in which negations are reduced to the opposite class. For as Christ said, it would have been better for some if they had never been born, that is not so ill: so for incurable dispositions, it is better, that is less evil, to die than to live, since by living they are sure to become worse. Seneca says they must perish, in order that they may not perish. So Jamblichus, Plutarch, Galen.

4 Some think that these are those whom St John speaks of as sinning unto death. But this is doubtful, and charity requires that we should not lightly hold any one's condition for desperate; and so we must rarely punish in such a view.

VIII. 1 The utility of him whose interest it was that the fault should not have been committed, consists in this, that he do not in future suffer anything of the same kind from the same person or from others. Gellius, from Taurus, says of this case: *When the dignity*

ait [u] ad mortem peccare. Sed quia fallacia sunt ejus rei argumenta, dictat caritas neminem temere habendum pro deplorato, ita ut hoc quidem fine animadversio, non nisi raro admodum, locum habere possit.

VIII. 1 [x] Utilitas ejus cujus intererat non peccatum esse in eo sita est, ne posthac tale quid patiatur ab eodem aut ab aliis. Gellius ex Tauro hanc speciem sic describit, *cum dignitas auctoritasve ejus in quem est peccatum tuenda est, ne prætermissa animadversio contemtum ejus pariat et honorem levet.* Sed quod de auctoritate læsa dicit, idem de libertate cujusque aut alio jure læso intelligendum est. Apud Tacitum legimus: *consuleret securitati justa ultione.* Ne qui læsus est ab eodem malum patiatur, tribus modis curari potest: primum si tollatur qui deliquit, deinde si vires nocendi ei adimantur, postremo si malo suo dedoceatur delinquere, quod cum emendatione de qua jam egimus conjunctum est. Ne ab aliis lædatur qui læsus est, punitione non quavis, sed aperta atque conspicua quæ ad exemplum pertinet, obtinetur.

Noct. Att. vi. 14.

Ann. xiv. 61.

2 Ad hos ergo fines, et intra æqui terminos si dirigatur vindicatio, etiam privata, si jus nudum naturæ, id est, abduc-

sint delictorum genera, alia quidem quæ spem præbent rerum meliorum, neque curationem penitus repudiant, alia vero hominum insanabiliter peccantium: huic generi leges mortem malorum exitum reperere, non tam ipsorum quam omnium aliorum bono, (*Orat.* II. p. 89 B. *Ed. Spanhem.*)

[x] *Utilitas ejus cujus intererat non peccatum esse*] Etiam hujus rei in feris imago quædam. *Leo in adulteræ pœnam consurgit.* Plinius *Historiæ Naturalis* VIII. 16.

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or authority of him against whom the offense is committed is to be protected, lest punishment omitted produce contempt thereof, and diminish its honour; but what is said of injury done to authority is true of injury done to liberty, or to any other right. As Tacitus says of a person, *That he might consult his security by just punishment.*

That he who has been injured may not suffer evil from the same person, may be provided for in three ways: first, by the removal of the delinquent; second, by taking away his power of doing harm; thirdly, by teaching him, by suffering, not to offend; which is connected with the amendment of which we have spoken. That the person offended shall not be injured by another, is to be procured, not by any casual punishment, but by a punishment open and conspicuous, of the nature of example.

2 Up to these limits then, if vindicative punishment be directed, and be kept within the bounds of equity, even if inflicted by a private

tum a legibus divinis humanisque, et ab his quæ non necessario rei accidunt, respicimus, non est illicita: sive fiat ab ipso qui læsus est, sive ab alio, quando hominem ab homine adjuvari naturæ est consentaneum. Atque hoc sensu admitti potest quod Cicero cum jus naturæ esse dixisset id, quod nobis
De Inven. ii. 22. non opinio sed innata vis affert, inter ejus exempla collocat vindicationem, quam gratiæ opponit: ac ne quis ambigeret quantum eo nomine vellet intelligi, vindicationem definit, *per quam vim ac contumeliam, defendendo aut ulciscendo, propulsamus a nobis ac nostris, qui nobis cari esse debent, et per quam peccata punimus.* Mithridates in oratione quam
Lib. xxxviii. 4. ex Trogo exscripsit Justinus: *adversus latronem si nequeant pro salute, pro ultione tamen sua omnes ferrum stringere.*
Pag. 1043 E. Hoc ipsum *ἀμύνης νόμον* vocat in vita Arati Plutarchus.

3 [y] Hoc naturali jure defendens se Sampson adversus
Jud. xv. 3. Palæstinos, insontem se testatur fore si Palæstinos qui se malo affecerant malo vicissim afficeret: Et post peractam ultionem
Ibid. ver. 11. eadem se tuetur ratione, dicens se ipsis fecisse quod ipsi sibi
Lib. iii. 56. fecissent priores. Platæenses apud Thucydidem: *ὀρθῶς ἐτιμωρησάμεθα κατὰ τὸν πᾶσι νόμον καθεστῶτα, τὸν ἐπιόντα πολέμιον ὅσιον εἶναι ἀμύνεσθαι· merito eos ulti sumus, jure apud omnes recepto, ut hostilia parantem ulcisci liceat.*

[y] *Hoc naturali jure*] Φόνον φόνῳ λελύσθαι· Romulus de Tatio occiso a Laurentibus, *cædem cæde pensatam*, apud Plutarchum, (*Vit. Rom.* p. 32 C.) Belisarius apud Procopium *Vandalicorum* I: *φύσει γὰρ πρόσεστι τοῖς ἀδικουμένοις ἡ πρὸς τοὺς βιαζομένους ἐχθρά: naturalis enim est læsi hominis in eum qui vim intulit inimicitia.* (Cap. 16.)

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hand, it is not unlawful, if we look at the naked law of nature, that is, abstracting divine and human law, and conditions which are not necessary concomitants of the thing itself; whether it be inflicted by him who is injured, or by another; since for man to help man is consentaneous to nature. And in this sense, we may admit what Cicero says, when he declares the law of nature to be that which is given us, not by opinion, but by an innate power; and then places among the examples thereof vindicative punishment, which he opposes to mercy. And that no one may doubt how much he would have understood by that term, he defines vindicative punishment to be *that by which we repel force and contumely from us and ours, by defending or revenging, and by which we punish offenses.* So Mithridates, in Justin, speaks of our *drawing the sword against robbers, if not for safety, yet for revenge.* And so Plutarch calls this *the law of defense.*

3 On the ground of this Natural Law, Samson reasoned when he

Demosthenes, oratione adversus Aristocratem, communem ait Pag. 437 A.
esse legem inter homines, ut eum qui nostra vi rapiat ulcisci nobis fas sit. Et Jugurtha apud Sallustium, cum dixisset Bell. Jug. c. 25.
Adherbalem vitæ suæ esse insidiatum, addit, populum Romanum *neque pro bono neque pro recto facturum si ab jure gentium se prohibuerit:* id est ab ultione. Aristides orator et a poëtis, et a legum auctoribus, et a proverbiis, et ab oratoribus, et omnibus denique hoc ait probari *ἀμύνεσθαι τοὺς* Orat. pro quat. vir.
ὑπάρξαντας, ultionem sumi de his qui injuriam facere ag- Tom. III. p. 239 A.
gressi sunt. Maccabæos laudat [z]Ambrosius, quod etiam sab- De Off. i. 40.
bato [a]ulti sunt innocentium necem fratrum suorum. Idem adversus Judæos incensam a Christianis basilicam graviter querentes disputans, sic ait: *Ac certe si jure gentium agerem,* Epist. 29. p. 562 C.
dicerem quantas basilicas Judæi tempore imperii Juliani incenderint: ubi [b]jus gentium vocat par pari referre. Nec aliter apud Tacitum Civilis: *egregium pretium laboris cepi,* Hist. iv. 32.
necem fratris, et vincula mea, et sævissimas hujus exercitus voces, quibus ad supplicium petitus jure gentium pœnas reposco.

4 Sed quia in rebus nostris et nostrorum affectu corrumpimur, ideo simul multæ familiæ in unum locum convenerunt, judices constituti, et his solis data potestas vindicandi læsos,

[z] *Ambrosius*] Eundem vide oratione contra Symmachum.

[a] *Ulti sunt innocentium necem fratrum suorum*] Vide Josephum *Antiquæ Historia* XIII. 1. de vindicata Johannis morte.

[b] *Jus gentium vocat par pari referre*] Sic et Livius libro I. *cum Laurentes jure gentium agerent,* (c. 14.)

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said (Judg. xv. 3), *Now shall I be more blameless than the Philistines though I do them a displeasure,* after they had injured him; and again, v. 11, *As they did unto me so have I done unto them.* So the Plateans in Thucydides said. So Demosthenes against Aristocrates. So Jugurtha in Sallust against Adherbal. Aristides the orator proves from the poets, legislators, orators, and from proverbs, the right of taking revenge on those who attack. Ambrose praises the Maccabees, who, even on the sabbath-day, avenged the death of their innocent brethren. And he too, arguing against the Jews who complained of their synagogue as having been burnt by the Christians, says, *If I went upon the law of nations, I should say how many Christian houses of worship the Jews burnt at the time of Julian:* where the law of nations to which he refers is, returning like for like. So Civilis in Tacitus.

4 But because in things which concern us and ours, we are misled

ademta ceteris quam natura indulserat libertate. Lucretius (Lib. v. vers. 1147, et seqq.):

> Acrius ex ira quod enim se quisque parabat
> Ulcisci, quam nunc concessum est legibus æquis,
> Hanc ob rem est homines pertæsum vi colere ævum.

Pag. 730 A. Demosthenes *in Cononem*: *προεώραται ἐν τοῖς νόμοις εἶναι τούτων ἑκάστου τὴν δίκην, μὴ τῇ τοῦ προστυχόντος* [5] *ὁρμῇ, μηδὲ βουλήσει ταῦτα κρίνεσθαι· placuit de omnibus his injuriis* [c] *ex legibus judicium exerceri, non autem ex cujusque*
Declam. xiii. *impetu atque arbitrio.* Quintilianus: *injuriæ compensatio non solum juri inimica, sed paci: est enim lex, forum, judex, nisi quem jure vindicari pudet.* Imperatores Honorius
L. nul. 14. C. de Jud. et Theodosius: *idcirco judiciorum vigor jurisque publici tutela in medio constituta, ne quisquam sibi ipsi permittere*

[5] Est apud DEMOSTHENEM, *ὀργῇ*, *ira*: neque vocem mutare necesse est. *J. B.*

[c] *Ex legibus judicium exerceri, non autem ex cujusque impetu atque arbitrio*] Tyndareus adversus Orestem sic declamat in Euripidis *Oreste* (vers. 491, *et seqq.*):

Πρὸς τόνδ' ἀγὼν τις ἂν σοφίας ἥκοι πέρι;
Εἰ τὰ καλὰ πᾶσι φανερὰ καὶ τὰ μὴ καλὰ,
Τούτου τίς ἀνδρῶν ἐγένετ' ἀσυνετώτερος,
Ὅστις τὸ μὲν δίκαιον οὐκ ἐσκέψατο,
Οὐδ' ἦλθεν ἐπὶ τὸν κοινὸν Ἑλλήνων νόμον.
Ἐπεὶ γὰρ ἐξέπνευσεν Ἀγαμέμνων βίον
Πληγεὶς θυγατρὸς τῆς ἐμῆς ὑπὲρ κάρα,
Αἴσχιστον ἔργον, οὐ γὰρ αἰνέσω ποτὲ,
Χρῆν αὐτὸν ἐπιθεῖναι μὲν αἵματος δίκην
Ὁσίαν διώκοντ', ἐκβαλεῖν τε δωμάτων
Ματέρα, τὸ σῶφρον τ' ἔλαβεν ἂν τῆς συμφορᾶς,
Καὶ τοῦ νόμου τ' ἂν εἴχετ', εὐσεβής τ' ἂν ἦν.
Νῦν δ' εἰς τὸν αὐτὸν δαίμον' ἦλθε μητέρι,
Κακὴν γὰρ αὐτὴν ἐνδίκως ἡγούμενος,
Αὐτὸς κακίων μητέρ' ἐγένετο κτανών.
Ἐρήσομαι δὲ, Μενέλεως, τοσόνδε σε.
Εἰ τόνδ' ἀποκτείνειεν ὁμόλεκτρος γυνὴ,
Χὠ τοῦδε παῖς αὖ μητέρ' ἀνταποκτενεῖ,
Κἄπειθ' ὁ κείνου γενόμενος φόνον φόνῳ
Λύσει, πέρας δὴ ποῖ κακῶν προβήσεται;

Huic me jubes certare de sapientia?
Quæ pulchra quæque fœda si cunctis patent,
Isto homine tandem quis fuit dementior,
Qui nec quod æquum est mente pervidit sua,
Nec quod per omnem Græciam leges jubent?
Namque ubi Agamemno spiritum efflarat suum
Transverberatus a mea nata caput,
(Quod turpe facinus absit ut dicto probem)
Tunc ille rite debuit matrem ream
Peragere cædis e lare ejectam suo.
Ita temperate pertulisset miseriam,
Pœnas petisset jure, servasset pium.
Nunc subiit illum, quod prius matrem, nefas.
Illam malam vocat ille, non injuria:
Sed pejor illa est ipse dum matrem necat.
Menelae, si permittis, hoc te interrogo:
Irata si uxor conjugem occidet suum,
Hanc ultor ipse filius tradet neci,
Et rursus illo genitus hanc cædem nova
Cæde expiabit, fine quo stabunt mala?

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by affection, therefore many families were brought together in one place, judges were constituted, and to these alone was given the power of righting those that were injured, the liberty which nature had given to other persons being taken away. So Lucretius of the origin of civil society: Demosthenes against Conon: Quintilian; the emperors Honorius and Theodosius; and king Theodoric. [See.]

5 Yet the old natural liberty remains; first, in places where there are no tribunals, as at sea. And to this perhaps we may refer the proceeding of Cæsar when, as a private man, having been taken by

valeat ultionem. Rex Theodoricus: *hinc est quod legum reperta est sacra reverentia, ut nihil manu, nihil proprio ageretur impulsu.* Cassiod. iv. 10.

5 Manet tamen vetus naturalis libertas, primum in locis ubi judicia sunt nulla, ut in mari. Quo forte referri potest quod Caius Cæsar privatus adhuc piratas, a quibus captus fuerat, classe tumultuaria persecutus est, ipsorumque naves partim fugavit, partim mersit, et cum proconsul negligeret animadvertere in captos piratas, ipse eos in mare reversus cruci suffixit. Idem locum habebit in locis desertis, aut ubi Nomadum more vivitur. [d] Sic apud Umbricos narrat Nicolaus Damascenus sibi quemque fuisse ultorem: quod et apud Moschos hodie impune fit, post tempus aliquod aditi judicis. Nec aliunde origo singularium certaminum quæ ante Christianismum

Vell. Pat. xi. 42. et Plut. *in Cæs.* p. 703.

Apud Stob. *de Leg.*

Quæ postrema plena prudentiæ materiam disserendi et philosophis et oratoribus præbuerunt. Maximus Tyrius in dissertatione an referenda injuria, (*Dissertat.* II. pag. 22. *Ed. Davis.*) εἰ γὰρ ὁ ἀδικηθεὶς ἀμύνεται, ἀεὶ μεταβαίνει τὸ κακὸν ἀπ' ἄλλου πρὸς ἄλλον, καὶ μεταπηδᾷ καὶ διαδέξεται ἀδικία ἀδικίαν. εἰ γὰρ τῷ αὐτῷ τούτῳ δικαίῳ τῷ παθόντι συγχωρεῖς ἐπεξιέναι εἰς τὸν ἀδικήσαντα, ἐπαναχωρεῖ αὖθις ἀπ' ἐκείνου πρὸς τὸν αὐτὸν ἡ τιμωρία, τὸ γὰρ δίκαιον ἐπ' ἀμφοῖν ἴσον. ὦ Ζεῦ καὶ οἷον πεποίηκας, δικαιοσύνην ἐξ ἀδικημάτων; καὶ ποῖ βαδιεῖται τὸ κακὸν, καὶ ποῦ στήσεται· *Nam si is qui passus est injuriam ultionem sumet, transibit malum ab hoc ad illum velut saltu quodam, et injustitiæ injustitia succedet; quippe si hoc jure posito concedis ei qui malum pertulit vindicare in eum qui fecit, sequitur ut rursus ab hoc ad illum se referat ultio, est enim justum, par utrique parti. Si id ita est, quid nobis fecisti, Jupiter, justitiam ex injuriis conflatam? et quo procedet, ubi vero stabit hoc malum?* Aristides *Oratione de Pace:* τίς γὰρ τῶν Ἑλλήνων λειφθήσεται, εἰ διὰ τοὺς προτέρους ἀπολωλοκότας, οἱ μετ' αὐτοὺς ἀεὶ ταὐτὸ τοῦτο πείσονται; *quis enim Græcorum erit reliquus, si propter eos qui jam periere superstites alii perpetuo idem malum ferent?* (Tom. II. p. 78 c. *Ed. P. Steph.*) Habet idem Aristides sensum similem, in Leuctrica secunda.

[d] *Sic apud Umbricos*] An Umbros in Italia significatos voluit? [Vide VALESIUM in Excerpt. Peiresc. p. 513.] Apud Afrorum multos idem moris fuisse testis est Leo Afer Lib. II. c. de Tefechis, et capite de Teijeuta, et alibi.

pirates, he collected ships, and partly put theirs to flight, partly sunk them; and then, when the proconsul was slow in punishing those who were taken, he himself gibbeted them. The same holds in deserts, or where men live a Nomadic life. So among the Umbrici, as Nicholas Damascenus relates, every one is his own avenger; which is also the custom among the Muscovites, after a certain time has elapsed from the application to the judge. And this was the origin of the duels which, before the introduction of Christianity, were common among the German nations, and are not yet sufficiently gone out of use. And so, as Paterculus relates, the Germans when they

[e]Germanicis nationibus usitata, alicubi needum satis desueta sunt. Ideo apud Velleium Paterculum mirantur Germani, cum Romanæ jurisdictionis formam conspicerent, quod injurias justitia finiret, quod solita armis discerni jure terminarentur.

Lib. ii. 118.

6 Lex Hebræa propinquo occisi permittit ut extra asyli loca homicidam interficiat: recteque notant interpretes Hebræi talionem pro mortuo manu exigi posse; pro se, ut puta in vulnere, non nisi per judicem, quia scilicet difficilior est moderatio ubi proprius dolor accedit. Parem morem, privatim vindicandæ cædis apud vetustissimos Græcos fuisse apparet ex Theoclymeni verbis quæ apud Homerum sunt *Odysseæ* O. Sed maxime frequentia sunt hujus moris exempla inter eos qui communem judicem non habent. Hinc *justa bella definiri solent*, Augustino teste, *quæ ulciscuntur injurias:* et Plato bellicum certamen probat, μέχρις οὗ ἂν οἱ αἴτιοι ἀναγκασθῶ-

Sen. i. *de Clem.* 20.

Ver. 272, *et seqq.*

Lib. ii. Qu. 10. *sup. Jos.*

De Rep. v. p. 471 B. Tom. II.

e *Germanicis nationibus*] Gotthos suos corrigens rex Theudericus apud Cassiodorum III. 23. *Remove consuetudines abominanter inolitas: verbis ibi potius, non armis res tractetur:* et 24. *Cur ad monomachiam recurritis? quid opus est homini lingua, si causam manus agit armata?* Trachonitis in oriente, νόμος πάντα τρόπον ἐπεξιέναι τοὺς τῶν οἰκείων φονεῖς· *mos omnibus modis ultionem sumere de propinquorum homicidis.* [Hoc e Josepho, *Antiq. Jud.* Lib. XVI. cap. ix. § 1. *Ed. Hudson.*]

f *Ne alii impunitate illecti aliis quibusvis molesti sint*] *Polybius leones ob hominum appetitum crucifixos vidit, quia ceteri metu pœnæ similis absterrerentur eadem noxa.* Plin. Lib. VIII. c. 16.

g *Sic Plutarchus*] Idem Pelopida, (p. 290) ὁ γὰρ πρῶτος, ὡς ἔοικε, καὶ κυριώτατος νόμος τῷ σώζεσθαι δεομένῳ τὸν σώζειν δυνάμενον ἄρχοντα κατὰ φύσιν ἀποδίδωσι· *Prima eademque antiquissimæ lex eum qui servare potest ei qui salute opus habet naturaliter magistratum designat.* Et Philopœmone: τοὺς ἑαυτοῦ πολίτας ἀνα-

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became acquainted with the Roman jurisdiction, admired to see injuries concluded by judicial proceedings, which they were accustomed to see terminated by an appeal to arms.

6 The Hebrew Law permitted the relative of the person slain to kill the slayer, anywhere without the places of refuge: and the Hebrew commentators rightly note, that retaliation for a person slain might be executed by personal force; but for the person himself, for example for a wound, no otherwise than before a judge; because moderation is more difficult when the pain comes nearer ourselves. That a like mode of avenging murder by the hands of a private person prevailed among the Greeks of old, appears in Homer. But the examples of this are most frequent among those who have not a proper judge. *Just wars,* says Augustine, *are commonly defined to be those which avenge injuries;* and Plato approves battles on such ground.

σιν ὑπὸ τῶν ἀναιτίων ἀλγούντων δοῦναι δίκην· donec qui in culpa fuerint cogantur innocentibus dolore affectis pœnas pendere.

IX. 1 Utilitas indistincte quorumlibet, qui finis erat tertius, easdem habet partes quas illa quæ ad læsum pertinet. Nam aut hoc agitur, ne qui uni nocuit aliis noceat, quod fit cum tollendo aut debilitando, sive constringendo ita ut nocere nequeat, aut emendando: aut [f]ne alii impunitate illecti aliis quibusvis molesti sint, quod ex suppliciis conspicuis obtinetur, quæ Græci *παραδείγματα*, Latini exempla vocant: quæ ideo adhibentur ut unius pœna metus sit multorum, ut pœnæ genere deterreri ceteri possint, ut leges loquuntur, *ἵνα ἄλλοι πρόνοιαν ποιῶνται καὶ φοβῶνται*, ut Demosthenes.

L. 1. C. ad L. Jul. de Rep. L. 7. C. ad L. Fab. de Plag. Orat. in Neær. p. 523 F.

2 Hujus quoque juris potestas naturaliter penes unumquemque est. [g]Sic Plutarchus virum bonum ait a natura

Præcept. polit. p. 817 B.

λαβὼν οὔτε νόμον, οὔτε χειροτονίαν περιμείναντας, ἀλλ' ὡς διὰ παντὸς ἄρχοντι τῷ κρείττονι κατὰ φύσιν ἑπομένους· Suscepit cives suos qui neque legum neque suffragiorum tempus expectaverunt: sed ipsum sequebantur naturæ lege, quæ semper potiorum vult imperare deterioribus. (Pag. 363 A.) Similia apud eum habes fine vitæ T. Flaminii. Scriptor de causis corruptæ eloquentiæ, de oratoribus agens (cap. 36.) *Hi ne privati quidem sine potestate erant, cum et populum et senatum consilio et auctoritate regerent.* Chrysostomus II. ad Corinthios vii. 13. de Mose: *καὶ πρὸ τῆς χειραγωγίας δημαγωγὸς ἦν διὰ τῶν ἔργων. διὸ καὶ σφόδρα ἀνοήτως ἔλεγε πρὸς αὐτὸν ὁ Ἑβραῖος ἐκεῖνος· τίς σε κατέστησεν ἄρχοντα καὶ δικαστὴν ἐφ' ἡμᾶς; τί λέγεις; τὰ ἔργα ὁρᾷς, καὶ περὶ τῆς προσηγορίας ἀμφιβάλλεις, ὥσπερ ἂν εἴ τις ἴδοι τέμνοντα τὸν ἰατρὸν ἄριστα, καὶ τῷ πεπονηκότι μέλει τοῦ σώματος βοηθοῦντα, λέγοι, τίς σε κατέστησεν ἰατρὸν καὶ τέμνειν ἐκέλευσεν; ἡ τέχνη, ὦ βέλτιστε, καὶ ἡ νόσος ἡ σή· οὕτω καὶ τοῦτον ἡ ἐπιστήμη τοιοῦτον ἐποίησε·*

IX. 1 The utility of persons in general, which was the third end of punishment, offers the same divisions as the utility of the injured man. For either the object is that he who has done harm to one may not do harm to others; which is secured, either by taking him away, or by taking away his power of mischief, or by constraining him so that he cannot do harm, or by amending him: or else the object is to prevent others from being tempted by impunity to do harm to any others, which is provided for by conspicuous punishments, examples. These are employed, that the punishment of one may produce the fear of many; that others may be deterred by the kind of punishment, as the laws speak; that others may be compelled to look forward and fear, as Demosthenes says.

2 The right of inflicting such punishment, is also, by Natural Law, in the hands of every man. So Plutarch says that a good man is by nature pointed out as a perpetual magistrate; for by the law of

magistratum designari, et quidem perpetuum: nam ipsa naturæ lege ei principatum deferri, qui agat justa. Sic sapientem nunquam esse privatum Nasicæ exemplo probat Tullius; et Lollium non unius anni consulem Horatius vocat: et Euripides *Iphigenia in Aulide* (vers. 375):

Tusc. qu. iv. 23.

Mente qui prudente pollet is magistratum gerit.

Quæ tamen in republica intelligenda sunt, quatenus ejus leges id ferunt.

Apud Stob. Serm. 44.

3 De hoc naturali jure ita loquitur Democritus: ipsius enim verba quia notabilia sunt adferam. Primum de jure bestias interficiendi sic illi videtur: *κατὰ δὲ ζώων φόνου καὶ μὴ φόνου ὧδε ἔχει· τὰ ἀδικέοντα καὶ θέλοντα ἀδικεῖν ἀθῷος ὁ κτείνων, καὶ πρὸς εὖ ἔστ' οὖν τοῦτο ἔρδειν μᾶλλον ἢ μή· de occidendis aut non occidendis animantibus ita se res habet: quæ injuriam faciunt aut facere volunt quisquis occiderit, purus est, adeo quidem ut hoc fecisse*

καὶ γὰρ τέχνη τὸ ἄρχειν ἐστιν, οὐκ ἀξίωμα μόνον, καὶ τέχνη τεχνῶν πασῶν ἀνωτέρα· *Etiam antequam manu populum educeret, dux erat ipsis factis. Valde igitur stulte Hebræus ille ei dixit: quis te constituit nobis principem ac judicem? Quid dicis? facta vides, et de nomine facis controversiam; velut si quis medicum videat optime secantem ac sic opitulantem ægro corporis membro, deinde ei dicat, quis te constituit medicum, quis secare præcepit? ars, mi bone vir, et morbus tuus: sic et Mosem sua peritia talem fecit; nam et imperare non dignitas tantum est, sed et ars, et quidem artium omnium sublimissima.* (Tom. III. pag. 631, 632. *Ed. Savil.*) Tractat idem scriptor hoc ipsum argumentum ad Eph. iii. in fine: (Tom. eod. p. 798) ἡ ἀδικία ἡ σὴ καὶ ἡ ὠμότης, φησὶν, αὕτη με κατέστησεν ἄρχοντα καὶ δικαστήν· *tua*, inquit, *injustitia, tua feritas me constituit principem et judicem.* [PLUTARCHI locus, cujus occasione omnia ista addita sunt, non satis adcurate refertur, ut inspicienti patebit. Præterea illorum sententia posset videri repugnare principiis Auctoris nostri, ut ostendimus in Gallicis nostris Notis. *J. B.*]

[h] *Ante diluvium*] Aliquos et postea moris primævi memores: ita Dicæarchus et alii, quos testes citat Hieronymus contra Jovinianum. (Tom. II. p. 78. *Edit. Basil.*)

[i] *Quo serpentes et animalia venenata percutio*] Καθάπερ οὖν ἔχεις καὶ σκορπίους καὶ ὅσα ἰοβόλα, πρὶν δακεῖν ἢ τρῶσαι καὶ συνόλως ὁρμῆσαι, θεασάμενοι μόνον χωρὶς ὑπερθέσεως κτείνομεν, προφυλαττόμενοι διὰ τὴν ἐνυπάρχουσαν ἐν αὐτοῖς κακίαν, τὸ μηδὲν παθεῖν. τὸν αὐτὸν τρόπον καὶ ἀνθρώπους ἄξιον τιμωρεῖσθαι, οἱ φύσεως ἐπιλαχόντες ἡμέρου διὰ τὴν κοινωνίας αἰτίαν λογικὴν πηγὴν, ἐπιτηδεύσει πρὸς θηρίων ἀτιθάσσων ἀγριότητας μεταβάλλουσιν, ἐν ἡδονῇ καὶ ὠφελείᾳ

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nature, authority is given to him who does just things. So Cicero proves that a wise man is never a private man, by the example of Scipio Nasica. And Horace calls Lollius, Consul not for his year alone: so Euripides: which however must be understood with reference to the laws of the State.

quam non fecisse sit rectius. Et mox: κτείνειν χρὴ τὰ πημαίνοντα παρὰ δίκην πάντα περὶ παντός· *ea quæ injuste nobis nocent omnino et omnia fas occidere.* Et certe non improbabile est hoc more vixisse viros probos [h]ante diluvium, antequam Deus suam voluntatem de vertendis in hominum alimenta animantibus ceteris prodidisset. Rursus: ὅκως περὶ κινάδεων τε καὶ ἑρπετέων γεγράφαται τῶν πολεμίων, οὕτω καὶ κατ' ἀνθρώπων δοκεῖ μοὶ χρεὼν εἶναι σκοπεῖν· *Quæ vero de vulpibus et de inimicis serpentibus scripsimus, eadem in hominibus facienda videntur.* Tum vero subjungit: κιξάλλην καὶ λεστὴν πάντα κτείνων τις ἀθῷος ἂν εἴη, καὶ αὐτοχειρία καὶ κελεύων καὶ ψήφῳ· *furem et latronem qui quocumque modo occiderit, sive manu, sive jussu, sive suffragio, innocens est.* Ad quos locos respexisse mihi videtur Seneca, cum ait: *cum cervices noxio præcidi* Lib. i. *de Ira*, c. 16. *imperabo, eo vultu animoque ero* [i]*quo serpentes et animalia*

τιθέμενοι τὸ κακῶς ποιεῖν ὅσους ἂν δύνωνται· *sicut ergo viperas et scorpios et quæ alia veneno nocent, priusquam aut mordeant, aut ullum in nos impetum faciant, statim sine mora occidimus, præcaventes ne quid patiamur mali ab ea quæ in ipsis est malignitate; eundem ad modum et homines puniri par est, qui naturam nacti mansuetam, propter fontem rationis quæ ad societatem trahit, institutis in ferarum sævitiam transeunt, utilitatique ac voluptati habent nocere quam possunt plurimis.* Hæc Philo *De Specialibus Legibus* II. (pag. 793 A. B.) Claudius Neapolitanus apud Porphyrium Lib. I. de non esu animalium: οὐκ ἔστι γὰρ ὅστις ἰδὼν ὄφιν οὐκ ἔκτεινε δυνάμενος, ὡς μήτ' αὐτὸς δηχθείη μήτ' ἄλλος ἁπλῶς ἄνθρωπος· *nemo est qui serpentem sibi conspectum si possit non occidat, ne aut ipse ab eo vulneretur aut alius.* (Pag. 32.) Vide, si vacat, et sequentia: ibidem non multo post: ὄφιν καὶ σκορπίον, κἂν μὴ ἐπίωσιν ἡμῖν, κτείνομεν, ἵνα μηδ' ἄλλος πρὸς αὐτῶν τι πάθῃ, τῷ κοινῷ γένει τῶν ἀνθρώπων ἀμυνόμενοι· *serpentem et scorpium, etiamsi ab iis non impetamur, occidimus, ne cui noceat alii, et vindictam hanc præstamus humano generi.* (Pag. 40. *Ed. Lugd.* 1620.) Porphyrius ipse libro II. ὥσπερ γὰρ οἰκειότητος οὔσης ἡμῖν πρὸς τοὺς ἀνθρώπους τοὺς κακοποιοὺς, καὶ καθάπερ ὑπό τινος πνοῆς ἰδίας φύσεως καὶ μοχθηρίας φερομένους πρὸς τὸ βλάπτειν τὸν ἐντυγχάνοντα, ἀναιρεῖν ἡγούμεθα δεῖν καὶ κολάζειν ἅπαντας, οὕτως καὶ τῶν ἀλόγων ζώων τὰ ἄδικα τὴν φύσιν καὶ κακοποιὰ, πρός τε τὸ βλάπτειν ὡρμημένα τῇ φύσει τοὺς ἐμπελάζοντας, ἀναιρεῖν ἴσως προσήκει· *sicut enim, quanquam societas nobis quædam est cum hominibus malis, etiamsi qui suopte ingenio ac malitia veluti vento vehemente aguntur, ut cuivis sine discrimine noceant, tamen eos omnes recte a nobis puniri censemus; ita et mutorum animantium*

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3 Of this Natural Law Democritus speaks; first, of the right of killing harmful beasts; and certainly it is not improbable that good men did this before the deluge, before God had delivered his will to man, that other animals should become his food. And then he extends this to man: and afterwards says that whoever kills a

Sen. *de Ira*, ii. 31. *venenata percutio.* Et alibi: *ne viperas quidem et natrices, et si qua morsu aut ictu nocent, effligeremus, si ut reliqua mansuefacere possemus, aut efficere ne nobis aliisque periculo essent. Ergo ne homini quidem nocebimus quia peccavit, sed ne peccet.*

4 Sed cum et facti inquisitio sæpe magnam diligentiam, et pœnæ æstimatio multum prudentiæ et æquitatis desideret, ne dum quisque de se nimium præsumeret, aliis non credentibus, rixæ orirentur, eo placuit hominum justis communitatibus eos deligere quos optimos ac prudentissimos putarent, aut fore sperarent. Idem Democritus: Apud Stob. *Serm.* 38. οὐκ ἂν ἐκώλυον οἱ νόμοι ζῆν ἕκαστον κατ' ἰδίαν ἐξουσίαν, εἰ μὴ ἕτερος ἕτερον ἐλυμαίνετο· Φθόνος γὰρ στάσιος ἀρχὴν ἀπειργάζετο· *non prohibuissent utique leges suo quemque arbitrio vivere, nisi alter alterum offensum iisset. Invidia enim seditioni molitur exordium.*

5 Sed sicut in ultione factum modo diximus, ita et in hac ad exemplum punitione manent vestigia ac reliquiæ prisci

ea quæ sui natura sunt injusta et nocere amantia, quæque impetu ingenii sui feruntur in obvia cujusque perniciem, occidere ratione non caret. (Pag. 159.) Et hoc est quod vult Pythagoras apud Ovidium *Metam.* xv. *Nostrumque petentia lethum Corpora missa neci salva pietate fatemur.* (Vers. 108, 109.)

[k] *Illico a quovis homine poterat interfici*] Adde locum Josephi xii. (6. § 2. *Ed. Huds.*) Mosem Maimonidem ad xiii. articulos, et Directoris libro iii. c. 41.

[6] Non simpliciter, sed postquam accusatus et damnatus fuerat a Judicibus. Vide Pufendorfium nostrum, *De Jure Nat. et Gent.* Lib. viii. cap. 3. § 13. et Clarissimum Clericum in locum Deuteron. de quo agitur. *J. B.*

[l] *Judicium zeli*] Vide 1 Maccab. ii. 24, 26.

[7] Respublica Hebræa nondum tunc temporis prorsus constituta erat, quemadmodum fuit postea. Vide eumdem

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thief or robber, by his hand, command, or vote, is innocent. And Seneca seems to have referred to this. [See the passages.]

4 But since the proof of the fact often requires great care, and the estimate of punishment requires great prudence and great equity, communities of men have chosen, for this office, those whom they thought to be, or hoped to find, the best and most prudent. So Democritus.

5 But as in punishment vindicative, so in punishment exemplary, there remain vestiges of the original law, in those places and between those persons who are not under fixed judgments; and besides, in some excepted cases. So amongst the Hebrew customs, a Hebrew apostatizing from the true God and joining idolatrous worship, might be at once put to death by any person. The Hebrews

juris, in iis locis atque inter eas personas quæ certis judiciis non subsunt: ac præterea in quibusdam casibus exceptis. Sic *Deut.* xiii. 9.
Hebræorum moribus Hebræus a Deo et Dei lege deficiens, aut ducem se ad falsos cultus præbens, [k]illico a quovis homine [6]poterat interfici. [l]Judicium zeli id vocant Hebræi, quod a Phinea [7]primo exercitum aiunt, et inde abiisse in morem. *Num.* xxv.
Sic Judæum quendam Græcis se ritibus polluentem occidit Mathatias. Sic treccenti alii Judæi a popularibus suis occisi 1 *Maccab.* ii. 24.
referuntur, libro qui vulgo dicitur Maccabæorum tertius. Nec alio obtentu instituta lapidatio in Stephanum, et conjuratio in *Act.* vii. 57.
Paulum: multaque alia exempla ejuscemodi exstant et [m]apud *Act.* xxiii. 13.
Philonem, et apud Josephum.

6 Tum vero apud multos populos et dominis in servos et parentibus in liberos mansit jus puniendi plenum, etiam ad mortem usque. Sic Spartæ Ephoris licuit civem occidere extra judicium. Et ex his quidem quæ diximus quale sit circa pœnas jus naturæ, et quousque manserit intelligi potest.

X. 1 Nunc illud videndum est, num lex evangelica

Doctissimum Interpretem, quem modo laudavi, in Num. xxv. 7. et Celeberrimi J. FR. BUDDEI Dissertationem *De Jure Zelotarum in Gente Hebræa*, § 34. *et seqq.* *J. B.*

[m] *Apud Philonem*] Cujus et hoc in libro *de Sacrificantibus*: *κολαστέον ὡς δήμιον καὶ κοινὸν ἐχθρὸν ὄντα, ὀλίγα φροντίσαντας οἰκειότητος, καὶ τὰς παραινέσεις αὐτοῦ διαγγελτέον πᾶσι τοῖς εὐσεβείας ἐρασταῖς, οἳ ἀνυπερθέτῳ τάχει ταῖς κατ' ἀνδρὸς ἀνοσίου ἐπιδραμοῦνται τιμωρίαις, κρίνοντες εὐαγὲς τὸ κατ' αὐτοῦ φονᾷν· puniendus talis ut hostis publicus omnium, spreta qualicunque cum eo necessitudine, ejusque suasiones vulgandæ omnibus pietatem amantibus, ut sine mora accurrant undique ad expetendum de viro impio supplicium, firme credentes sanctam esse rem ejusmodi hominis interficiendi appetitum.* (Pag. 855 E.) Et alter locus non minus insignis circa finem de monarchia (Lib. I. pag. 818, 819.)

call it a judgment of zeal, of which they say Phineas set the first example. (Numb. xxv.) So in the Maccabees, Mattathias slew a Jew polluting himself with Greek rites; and so in 3 Maccab. 300 Jews were killed by their countrymen. And the stoning of Stephen, and the conspiracy against Paul, were on the same pretext, as well as many other examples in Philo and in Josephus.

6 So also among many peoples, masters retained the right of punishing their servants, and parents their children, even to death. So at Sparta, the Ephori could put a citizen to death without trial.

From what we have said, we may see what is the Law of Nature with regard to punishment, and how far it continued.

X. 1 We must now consider whether the Gospel Law has limited this liberty more narrowly. Certainly, as we have elsewhere said, it

libertatem illam arctius circumscripserit. Certe, ut alibi diximus, non mirum est, quædam quæ natura et per leges civiles licent vetari lege divina, eaque perfectissima, et præmium promittente natura humana majus: ad quod consequendum non immerito virtutes requiruntur, quæ sola naturæ præcepta excedant. [n] Castigationes quæ neque infamiam neque damnum permanens relinquunt, et pro ætatis aut alterius qualitatis ratione sunt necessariæ, si ab iis fiant quibus leges humanæ id permittunt, puta a parentibus, tutoribus, dominis, magistris, nihil habere quod cum præceptis evangelicis repugnet, ex ipsa rei natura satis intelligi datur. Sunt enim hæc remedia animorum non minus innocentia, quam pharmaca sensui ingrata.

2 De ultione aliter sentiendum est. Nam quatenus duntaxat animum dolentis exsatiat, illicitam esse etiam naturaliter, tantum abest ut Evangelio conveniat, supra ostendimus. Lex vero Hebræa non modo vetat odium asservari in proximum, id est, popularem, Levit. xix. 17, sed et communia quædam

[n] *Castigationes*] *Servorum filiorumque peccata non coercere, peccatum est.* Lactantius *de Ira Dei* c. 18. ubi plura ad hanc rem.

[o] *Ut imperfectiori tempori congruentem*] *Oculum pro oculo, quæ, si dici potest, injustorum justitia est.* Augustinus in expositione Psalmi cviii. citatus C. sex differentiæ 23. 1. Caus. 23. quæst. 3.

[p] *Tertullianus*] *Adversus Marcionem* IV. (Cap. 16.) Idem libro *de Patientia: Christus gratiam legi superducens ampliandæ adimplendæque legi adjutricem suam patientiam præfecit, quod ea sola ad justitiæ doctrinam retro defuisset.* (Cap. 6.) Chrysostomus ad Ephesios cap. iv. 13. *διὰ τοῦτο εἶπεν, ὀφθαλμὸν ἀντὶ ὀφθαλμοῦ καὶ ὀδόντα ἀντὶ ὀδόντας, ἵνα τὰς ἐκείνου δήσῃ χεῖρας, οὐχ ἵνα*

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is not to be wondered at, that some things which are permitted by the Natural and the Civil Laws are forbidden by the Divine Law; that being both the most perfect of Laws, and one which promises rewards beyond the discovery of mere human nature; and to obtain which, very reasonably, virtues are required which go beyond the mere precepts of nature. But punishments or castigations which neither leave behind them infamy nor permanent damage, and which are necessary, according to the age or other quality of the offender, if they are inflicted by those to whom human laws give such permission, as parents, tutors, masters, teachers, have nothing which is at variance with the evangelical precepts. These are remedies of the soul, as innocent as bitter medicines are.

2 With regard to revenge, the case is different. For so far as it is a mere satisfaction of the mind of the person offended, it is unlawful, not only by Gospel Law, but by Natural Law. The Hebrew Law

beneficia talibus inimicis impendi præcipit, Exod. xxiii. 4, 5. Quare proximi nomine ad omnes homines prolato per Evangelium, patet a nobis requiri, non modo ne noceamus inimicis, verum etiam ut benefaciamus, quod et diserte imperatur Matthæi v. 44. Lex tamen Hebræis graviores injurias permittebat ulcisci, non manu, sed adito judice. At Christus idem nobis non permittit, quod apparet ex illa oppositione, *audistis dictum fuisse, oculum pro oculo:* et mox: *ego vero dico vobis.* Quanquam enim quæ sequuntur de arcenda injuria proprie agunt, et hanc quoque licentiam aliquatenus saltem restringunt, multo tamen magis ultionem improbare censenda sunt, quia veterem permissionem [o]ut imperfectiori tempori congruentem rejiciunt: *οὐκ ἀδίκου τῆς δικαίας ἀμύνης οὔσης, ἀλλὰ κρείττονος τῆς ἀνεξικακίας; non quod iniqua sit justa ultio, sed quod ei præstet patientia*, ut est in constitutionibus Clementis Lib. VII. cap. 23.

3 Qua de re sic loquitur [p]Tertullianus: *novam plane patientiam docet Christus, etiam vicem injuriæ prohibens*

τὰς σὰς ἀντεξαγάγῃ, οὐχ ἵνα τῶν σῶν ὀφθαλμῶν ἀπείρξῃ τὴν βλάβην μόνον, ἀλλ' ἵνα καὶ τοὺς ἐκείνου διατηρήσῃ σώους. ἀλλ' ὅπερ ἐζήτουν, τίνος ἕνεκεν συγκεχωρημένης ἀμύνης, ἐνεκαλοῦντο οἱ τῷ πράγματι κεχρημένοι; mox: *συγγινώσκει ὁ θεὸς τοῖς ὑπὸ τῆς ἐπηρείας ἴσως συναρπασθεῖσι καὶ ἐπὶ τὴν ἄμυναν ὡρμηκόσι, διὸ λέγει, ὀφθαλμὸν ἀντὶ ὀφθαλμοῦ. καὶ πάλιν. ὁδοὶ μνησικάκων εἰς θάνατον. εἰ δὲ ἔνθα ὀφθαλμὸν ἀντὶ ὀφθαλμοῦ πηροῦν ἐξῆν, τοσαύτη κεῖται τιμωρία τοῖς μνησικάκοις, πόσῳ μᾶλλον τοῖς καὶ παρέχειν ἑαυτοὺς πρὸς τὸ παθεῖν κακῶς κελευσθεῖσι· ea de re dicit, oculum pro oculo, dentem pro dente, ut illius manus cohibeat, non ut tuas excitet contra, ut non tuis tantum oculis noxam arceat, sed et illius oculos salvos præstet: sed quod quærebam hoc erat,*

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too, not only forbids persons to bear malice against their neighbour, that is, their countryman, but even commands them to bestow certain common benefits on such enemies. And therefore the name of *neighbour* being by the Gospel extended to all men, it is required of us, not only that we do not do harm to our enemies, but that we do them good; which is also directly commanded, Matth. v. 44. The Hebrew Law permitted men to revenge the graver injuries, not by their own hand, but by recourse to the judge. Christ, however, does not permit the same to us; as appears by the opposition, *Ye have heard it said— But I say unto you.* For though what follows properly refers to the repelling of injury, and in some degree restricts even the liberty of doing that; these precepts are much more to be understood as condemning revenge; for they reject the ancient permission as suitable only to a more imperfect time. So the Clementine Constitutions.

3 Tertullian comments on Christ's teaching, as an addition to that

permissam a Creatore oculum exigente pro oculo, et dentem pro dente, contra ipse alteram amplius maxillam offerri jubens, et super tunicam pallio quoque cedi. Plane hæc Christus adjecerit, ut supplementa consentanea disciplinæ Creatoris. Atque adeo hoc statim renuntiandum est, an disciplina patientiæ prædicetur penes Creatorem. Sic per
vii. 10. *Zachariam præcipit, ne unusquisque malitiam fratris sui meminerit, sed nec proximi. Nam et rursus: malitiam, inquit, proximi sui unusquisque ne recogitet. Multo magis patientiam indixit injuriæ, qui indixit oblivionem. Sed et quum dicit, mihi vindictam et ego vindicabo, proinde patientiam docet vindictæ exspectatricem. In quantum ergo non capit, ut idem videatur et dentem pro dente, oculum pro oculo, in vicem injuriæ exigere, qui non modo vicem, sed etiam ultionem, etiam recordationem et recogitationem injuriæ prohibet, in tantum aperitur nobis quomodo oculum pro oculo et dentem pro dente censuerit, non ad secundam injuriam talionis permittendam, quam prohibuerat interdicta ultione, sed ad primam coercendam quam prohibuerat opposita talione, ut unusquisque respiciens licentiam secundæ injuriæ a prima semetipsum contineret. Facilius enim vim comprimi scit repræsentatione talionis, quam repromissione ultionis. Utrumque autem constituendum fuit pro natura et fide hominum, ut qui Deo crederet, ultionem a Deo exspectaret: qui minus fideret, leges talionis timeret.*

4 *Hanc legis voluntatem de intellectu laborantem, dominus et sabbati, et legis, et omnium paternarum dispositionum Christus et revelavit et compotem fecit, mandans alterius quoque maxillæ oblationem, ut tanto magis vicem injuriæ extingueret, quam et lex per talionem voluerat im-*

cur ultione permissa culpantur ii qui ad eam decurrunt? mox: *ignoscit Deus iis, quos si forte contumeliæ sensus abripuit et ad ultionem tulit impetus; ob id dicit, oculum pro oculo: at alibi: viæ iracundorum ad mortem, quod si, ubi oculum*

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of the Old Testament, that vengeance is to be left to God. They who believe in him, are to expect that He will punish; they who do not, are to fear retaliation.

4 Christ, he adds, did not destroy the teaching of the Old Law. God has provided judges of injury. Without this, forbearance loses its reward: for it is by the fear of punishment that injury is controlled.

*pedisse, certe quam prophetia manifeste coërcuerat, et memoriam injuriæ prohibens et ultionem ad Deum redigens. Ita si quid Christus intulit, non adversario, sed adjutore præcepto, non destruxit disciplinas Creatoris. Denique si in ipsam rationem patientiæ præcipiendæ, et quidem tam plenæ atque perfectæ consideremus, non consistet si non est Creatoris, qui vindictam repromittit, qui judicem præstat. Alioqui si tantum patientiæ pondus non modo non repercutiendi, sed et aliam maxillam præbendi, et non modo non remaledicendi, sed etiam benedicendi, et non modo non retinendi tunicam, sed amplius et pallium concedendi is mihi imponit, qui non sit me defensurus, in vacuum patientiam præcepit, non exhibens mihi mercedem præcepti, patientiæ dico fructum, quod est ultio, quam mihi permisisse debuerat si ipse non præstat, aut si mihi non permittebat ipse præstaret, quoniam et disciplinæ interest injuriam vindicari. **Metu enim ultionis omnis iniquitas refrænatur.** Ceterum passim emissa libertate, dominabitur utrumque oculum effossura, et omnem dentem excitatura præ impunitatis securitate.*

5 Censet, ut videmus, Tertullianus non modo Christianis postulationem talionis esse vetitam, sed ne Hebræis quidem permissam, tanquam quæ vitio careret, sed majoris mali vitandi causa. Quod quin verum sit de tali postulatione, quæ ex odio venit, non est dubitandum, ut ex superioribus apparet. Nam hanc improbatam etiam illis qui inter Hebræos sapientia excellebant, nec legis verba tantum sed et propositum intuebantur, ex Philone apparet, apud quem Judæi Alexan- Pag. 932 D.
drini in Flacci Judæorum vexatoris calamitate ita loquuntur: οὐκ ἐφηδόμεθα, ὦ δέσποτα, τιμωρίαις ἐχθροῦ, δεδιδαγμένοι πρὸς τῶν ἱερῶν νόμων ἀνθρωποπαθεῖν· *non delectamur, o*

vice oculi eruere permissum est, tanta est iracundi pœna, quanto magis apud eos qui mala passi præbere se ulterioribus injuriis jubentur? (Tom. III. pag. 845, 846. *Edit. Savil.*)

Without this, violence would go to extremes.

5 Thus Tertullian thinks that revenge was permitted to the Hebrews, not as a thing blameless, but to avoid a greater evil. And this is undoubtedly the case, with such demand of satisfaction as proceeds from wrath; and so the purpose of the law was understood, as appears in Philo. And this is the point to which Christ's precepts

domine, ultione de inimico, nam [q] *ex sacris legibus didicimus hominum misereri.* Et huc pertinet quod Christus a nobis indistincte exigit, ut omnibus remittamus qui in nos deliquerunt. Matth. vi. 14, 15, id est, ob sensum mali nostri malum illis nec procuremus, nec optemus: nam id qui facit, ut cum Claudiano loquar, *ferus est, legumque videtur vindictam præstare sibi.* Quam ob causam Lactantius dictum illud Ciceronis commemorans: *justitiæ primum munus est, ne cui noceat nisi lacessitus injuria,* ait simplicem veramque sententiam duorum verborum adjectione corruptam: et Ambrosius idem illud Ciceronis dictum vacare ait Evangelii auctoritate.

De Mall. Cons. v. 224. Lib. vi. 18. *De Offic.* i. 7. *Offic.* i. 28.

6 Quid autem de ultione dicemus, non quatenus præteritum respicit, sed quatenus in futurum cavet? Sane et hanc condonari vult Christus, primum [r] si qui nos læsit testimonia probabilia det pœnitentis animi, Lucæ xvii. 3; Ephes. iv. 32; Coloss. iii. 13, quibus locis de pleniore quadam remissione agitur, id est, quæ etiam in jus veteris amicitiæ restituat eum qui peccavit; unde sequitur, ut nihil ab eo pœnæ nomine exigi debeat. Præterea etiamsi absint talis pœnitentiæ signa, damnum haut nimium grave insuper habendum Christus præcepto dimittendæ tunicæ docet. Quin et Plato dixit non

In Criton. p. 49 B.

[q] *Ex sacris legibus didicimus hominum misereri*] Vide Originem *adversus Celsum.* (Lib. vii. pag. 348.)

[r] *Si qui nos læsit testimonia probabilia det pœnitentis animi*] Vide Mosem Maimonidem citatum ab eruditissimo Constantino libro de damno dato c. viii. § 7.

[s] *Hæc enim est simpli restitutio nihil pœnale continens*] Lex Wisigotthorum vi. 4, 3.

[t] *Pecuniariam mulctam*] Vide eundem Constantinum d. cap. viii. § 1.

[u] *Divortio se liberare maluit*] Au-

tend, when he enjoins forgiveness of injuries. We are not to procure or wish ill to men from the feeling of the ill which they have done us. So Claudian: and so Lactantius and Ambrose correct Cicero.

6 But what are we to say of revenge, as it respects, not the past, but protection for the future? Here also Christ enjoins us to forgive, if he who has injured us shews any signs of penitence; [see the passages;] in which he speaks of a plenary remission of injury, which may restore the offender to his former place in our good will; whence it appears that nothing is to be required of him in the way of punishment. And even if signs of such penitence be wanting, we are not to take it too severely, as the precept, of giving our coat also, shews. And even Plato said something like

referendum malum εἴ τε δεῖ ἡμᾶς τῶνδε χαλεπώτερα πάσχειν, *etiamsi quid gravius patiendum nobis immineat*, qui sensus et apud Maximum Tyrium exstat. Ὕβρεως δίκην, id est, actionem ob acceptam contumeliam aliquam (qualem Christus alapæ nomine indicat) negabat Musonius aut se instituturum, aut cuiquam ut institueret auctorem fore: multo enim rectius condonari talia.

7 Quod si dissimulatio magnum secum periculum ferat, ea cautione contenti esse debemus, quæ quam minimum noceat. Nam ne apud Hebræos quidem in usu erat talio, ut Josephus *Antiq. Jud.* iv. 8. § 35.
et alii Hebræorum doctores notant, sed solebat qui læsus erat ultra impendia a se facta, de quibus seorsim lex exstat Exod. xxi. 19, ([s]hæc enim est simpli restitutio nihil pœnale continens) pro talione [t]pecuniariam mulctam accipere: quod et Romæ factum docet apud Gellium Favorinus. Sic Josephus Lib. xx. 1.
domini nostri Jesu educator, cum uxorem suam adulterii compertam crederet, [u]divortio se liberare maluit, quam commit- *Matth.* i. 19.
tere ut traduceretur: atque id fecisse dicitur quia justus erat, id est, vir probus ac facilis: ad quem locum [3]Ambrosius ait, non tantum ab ultionis atrocitate, sed etiam [x]ab accusationis severitate alienam esse justi personam; sicut et ante Lactantius dixerat, *neque accusare quemquam crimine capitali* *Inst. Div.* vi. 20.

gustinus libro II. *de Adulterinis Conjugiis: si autem (quod verius dicitur) non licet homini Christiano adulteram conjugem occidere, sed tantum dimittere.* (Cap. 15.)

[3] Locus est in Psalm. cxviii. Serm. 7. cap. v. p. 1473 D. *Ed. Paris.* 1569. *J.B.*

[x] *Ab accusationis severitate*] Vide Hincmarum de Divortio ad interrogationem V. in fine. c. laicos. caus. 2. quæst. 7. et ibi Panormitanum. Gail. *de Pace Publica* VIII. 3. Adde c. Accusasti, *de accusationibus*, ita ut est apud Brocardum.

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this. An Action for contumely (such as Christ indicates in speaking of one striking us on the cheek), Musonius said he would neither promote nor authorise, it being better that such things should be pardoned.

7 But if such forbearance bring great peril, we are to be content with such precaution as shall do the least harm to the offender. So among the Jews, the person offended accepted a pecuniary fine; which was also practised at Rome. So Joseph, the husband of Mary, and the educator of our Lord Jesus, when he conceived his wife to be guilty of adultery, was minded to put her away, not to bring her before a public tribunal; and this, because he was a just, that is, a merciful man. And on this account Ambrose and Lactantius praise him. So Justin, of the accuser of the Christians,

Apol. ii. p. 44. *justo licebit.* [y]Justinus de Christianorum accusatoribus agens: *nolumus,* ait, *eos puniri, qui in nos calumniantur. Sufficit illis sua pravitas et rerum bonarum ignorantia.*

8 Restant pœnæ quæ non privato, sed publico bono consulunt: partim tollendo aut coërcendo nocentem ne cui noceat, partim deterrendo alios severitate exempli, quas non sublatas a Christo certissimo argumento alibi probavimus, quod cum sua daret præcepta simul testabatur se nihil legis tollere. Lex autem Mosis, quæ in his rebus, quamdiu stabat respublica, stare debebat, magistratibus rigide imperabat ut homicidia et alia quædam crimina punirent: Exod. xxi. 14; Num. xxxv. 31, et seqq.; Deut. xix. 13. Quod si Christi præcepta consistere potuerunt cum lege Mosis [z]quatenus supplicia etiam capitalia irrogabat, [a]possunt et cum humanis legibus divinam hac in parte imitantibus consistere.

XI. 1 Sunt qui ut contrariam sententiam tueantur adferunt summam Dei lenitatem in novo fœdere, quæ proinde hominibus, etiam magistratibus ut Dei vicariis, sequenda sit: quod aliquatenus verum esse non negamus, sed non tam late

[y] *Justinus*] Ejusdem est: μηδὲ μικρὸν ἀμείβεσθαι μηδένα βουλόμενοι, ὡς ὁ καινὸς νομοθέτης ἐκέλευσε· *ne minimum quidem ulcisci quenquam volentes, ut novus legis conditor præcepit.* (*Dialog. cum Tryphon.* pag. 182. *Ed. Sylb.*) Adde quæ infra § 15.

[z] *Quatenus supplicia etiam capitalia irrogabat*] Pharisæorum circa pœnas ἐπιείκειαν prædicat Josephus (*Antiq. Jud.* Lib. XIII. cap. xi. § 6.) Hinc tot legum ad publicas pœnas pertinentium exceptiones, et illud, ut ubi omnino mors inferenda est, inferatur quam lenissime: quod est in Talmude titulo Ketuboth.

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says, We do not wish our calumniators to be punished: their depravity and ignorance are punishment enough.

8 There remain punishments which provide, not for private but for public good; partly by coercion of the mischievous, partly by the effect of example. And that these are not taken away by Christ, we have elsewhere clearly proved, in that while he gave his precepts, he declared that he did not destroy the Law. The Law, as long as it continued, rigidly required the magistrates to punish homicide and some other crimes. And if the precepts of Christ could stand along with the law of Moses when it pronounced even capital punishments, they may also stand along with human laws, which in this respect imitate the Divine Law.

XI. 1 There are some, who in defense of the contrary opinion, adduce the great mercy of God in the New Covenant, which they conceive must be followed by men, and even by magistrates, as the vicars of God: and that this is in some degree true we do not deny,

patet quam illi volunt. Nam Dei ingens misericordia in novo federe patefacta præcipue spectat peccata contra primævam legem, aut etiam contra legem Mosis commissa ante acceptam Evangelii notitiam, Actor. xvii. 30; Rom. ii. 25; Actor. xiii. 38; Hebr. ix. 15. Nam quæ postea committuntur, præsertim si adsit contumacia, comminationem habent [b]judicii multo severioris, quam illud fuit quod per Mosem est institutum, Hebr. ii. 2, 3, x. 29; Matth. v. 21, 22, 28. Neque vero in altera tantum vita, sed et in hac ipsa in tales culpas Deus non raro animadvertit, 1 Cor. xi. 30. Ac talium facinorum indulgentia non solet impetrari, [c]nisi ipse homo de se quasi pœnas exegerit, 1 Cor. xi. 31, gravi quodam mœrore, 2 Cor. ii. 7.

2 Urgent iidem saltem pœnitentia ductis dandam impunitatem. Sed ut omittam de vera pœnitentia hominibus vix esse ut constet, nec quemquam non impune sua malefacta laturum, si eam quovis modo profiteri sufficiat, Deus ipse non semper pœnitentia ductis omnem remittit pœnam: quod vel Davidis exemplo apparet. Sicut ergo pœnam legis, id est mortem vio-

[a] *Possunt et cum humanis legibus, divinam hac in parte imitantibus, consistere*] Augustinus quæstionum evangelicarum libro I. quæstione x.

[b] *Judicii multo severioris quam illud fuit quod per Mosem est institutum*] Chrysostomus idem dicit, tum in oratione ad patrem fidelem, tum secunda de jejunio.

[c] *Nisi ipse homo de se quasi pœnas exegerit*] *Peccator ante veniam deflere se debet.* Tertullianus *de Pœnitentia*, (c. 6.) Ambrosius in Psal. xxxvii. Chrysostomus in 1 ad Corinthios Hom. xxviii. et in Matthæum Hom. xlii. Adde 2 Cor. vii. 9 et 10.

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but it does not extend so far as they wish. For the great mercy of God in the New Covenant especially regards offenses against the primeval law [given to Adam], or the law of Moses, committed before the knowledge of the Gospel was received. [See the passages quoted.] For transgressions committed after this, especially if there be added contumacy, have a threatening of a much more severe judgment than that which was instituted by Moses. [See the passages.] And not in another life only, but in this also, God frequently punishes such transgressions. And such offenses are not commonly pardoned except man punish himself, by serious contrition, 1 Cor. xi. 31, 2 Cor. ii. 7.

2 They urge that at least they who are penitent ought to receive impunity. But, not to say that true penitence is a matter of which men can hardly be assured, and that any one may obtain impunity if it be sufficient to profess penitence in any way he chooses; God himself does not always remit the whole of the punishment to those who are penitent, as appears by the example of David. As therefore

lentam aut alioqui immaturam, remittere potuit Deus, ita ut non levibus malis afficeret eum qui deliquerat, [d]sic nunc quoque potest pœnam remittere mortis æternæ, atque interim peccatorem aut morte immatura ipse punire, aut velle etiam ut sic per magistratum puniatur.

Synes. *Epist.* 44.

XII. 1 Rursum alii hoc accusant, quod cum vita simul spatium ad pœnitendum præciditur. Sed sciunt hujus rei a piis magistratibus summam haberi rationem, nec quemquam ad supplicium rapi, nisi dato tempore quo peccata sua agnoscere ac serio detestari possit; [e]qualem pœnitentiam, etiamsi opera morte interclusa non sequantur, acceptam Deo esse posse, latronis cum Christo crucifixi exemplum probat. Quod si dicatur vitam longiorem ad magis seriam resipiscentiam prodesse potuisse, responderi poterit, inveniri interdum, quibus merito dici possit [f]illud Senecæ: *quod unum bonum tibi superest, repræsentabimus mortem:* ut et illud ejusdem: *quo uno modo possunt desinant mali esse;* quod Eusebius philosophus dixerat; ἐπειδὰν οὐχ οἷόν τε ἄλλως καὶ τούτῳγε οὖν τῷ τρόπῳ

Lib. i. *de Ira*, c. 16.
Ibid. c. 15.

[d] *Sic nunc quoque potest pœnam remittere mortis æternæ, atque interim peccatorem aut morte immatura ipse punire*] Hieronymus in cap. i. in Nahum, qui locus relatus est in c. 6. causæ xxiii. quæstionem 5. Agathias, Lib. v. ex Platone. (Cap. 2.)

[e] *Qualem pœnitentiam etiamsi opera morte interclusa non sequantur*] Hieronymus ad Damasum, citatus in c. importuna, 58. *de pœnitentia*, dist. I.

[f] *Illud Senecæ*] Cujus et hoc est *de Beneficiis*, VII. 20. *ingeniis talibus vitæ exitus remedium est, optimumque est*

God could remit the punishment of the law, that is, violent or untimely death, and yet inflict evils not at all slight upon the offender; so now also, he may remit the punishment of eternal death, and yet give up the offender to untimely death, either inflicted by himself, or, in conformity with his will, by the magistrate.

XII. 1 Again, others use this argument, that when life is taken, the time for penitence is cut off. But they know that pious magistrates take careful account of this view, and that no one is hurried to capital punishment without giving him time to see and seriously to detest his sins: and that such penitence, although works corresponding do not follow, being intercepted by death, may be accepted by God, the example of the thief crucified with Christ proves. But if it be said that a longer life might have been profitable for a more serious repentance, there may also be found those to whom may deservedly be applied what Seneca says, *The only good thing which you can now furnish is the spectacle of your death:* and again: *Let them cease to be bad men by death, the only way they can.* As Eusebius the philosopher also says, *Since they can do it no other way, let them at least in this*

ἀπολυθέντες τοῦ ἐνταῦτα δεσμοῦ τῆς κακίας πορίσωνται φυγήν.

2 Hæc ergo, supra ea quæ operis initio diximus, responsa sunto illis qui supplicia, aut omnia, aut capitalia, sine ulla exceptione Christianis prohibita volunt, contra quam nos Apostolus docet, qui cum regio officio usum gladii inclusisset ut exercitium divinæ ultionis, alibi orandum ait, ut reges Christiani fiant, et qua reges sunt, innocentibus sint præsidio: quod, quæ etiam post Evangelium propagatum magnæ partis hominum est improbitas, obtineri non potest, nisi quorundam morte reprimatur aliorum audacia, quippe cum ne sic quidem inter tot cruces et supplicia sontium satis tuta sit innocentia.

3 Neque tamen abs re erit Christianis rectoribus, saltem ex parte aliqua, imitandum proponere [g]exemplum Sabaconis Ægyptii regis, pietatis nomine laudatissimi, a quo capitales pœnas in damnationem ad opus mutatas felicissimo successu narrat Diodorus: etiam ad Caucasum gentes quasdam ait Lib. i. 65.
Strabo: μηδένα ἀποκτείνειν τῶν ἐξαμαρτόντων τὰ μέγιστα· Lib. xi. p. 520.

obire ei qui ad se nunquam rediturus est: item: *eadem manu beneficium omnibus dabo: illi reddam, quando ingeniis talibus vitæ exitus remedium est.* Ibid.

[g] *Exemplum Sabaconis Ægyptii regis*] Imo et Romanorum magna ex parte, quorum nemo post legem Porciam mortis aut verberum supplicio affici potuit, nisi perduellis, aut ab ipso populo damnatus. [De Lege Porcia vide Livium, x. 9.]

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escape the bonds of wickedness, and find that refuge.

2 This then, in addition to what we said at the beginning of the work, is our answer to those who hold that either all punishment, or at least capital punishments, are without exception forbidden to Christians: which is contrary to what the Apostle teaches us, who includes the use of sword in the royal office, as the exercise of divine vengeance; and who elsewhere bids us to pray that kings may be Christian, and, as kings, be a protection to the innocent. And this, seeing the wickedness of great part of men, even after the propagation of the Gospel, cannot be, except, by the death of some, the boldness of others be repressed; since even now, when capital punishments and gibbets are so common, there is scarcely safety for innocence.

3 Still it will not be improper for Christian rulers, at least in some degree, to propose for their imitation the example of Sabaco, king of Egypt, who is reported by Diodorus to have commuted capital punishments for condemnation to the public works, with the happiest success. And Strabo says, that even the peoples about Caucasus *pun-*

nemini mortem irrogasse, quamvis pessima merito. Neque Lib. xii. 1. *Inst. Orat.* spernendum illud Quintiliani: *nemo dubitabit, quin, si nocentes mutari in bonam mentem aliquo modo possint, sicut posse interdum conceditur, salvos esse eos magis e republica sit quam puniri.* Notat Balsamo leges Romanas, quæ mortis pœnam irrogabant, [h]a posterioribus Imperatoribus Christianis mutatas plerasque [i]in alia supplicia, quo et acrius damnatis inureretur pœnitentia, et magis ad exemplum proficeret pœna diuturnior.

XIII. 1 Ex ea autem quam nos fecimus enumeratione finium pœnæ apparet nonnihil prætervisum a Tauro philosopho, *Noct. Attic.* vi. 14. ex quo ita Gellius: *Quando igitur aut spes magna est ut is qui peccavit citra pœnam ipse se ultro corrigat, aut spes contra nulla est emendari eum posse et corrigi, aut jacturam dignitatis in quam peccatum est metui non necessum est, aut non id peccatum est, cujus exemplo necessario metu succurrendum sit, tum quicquid ita delictum est, non sane dignum esse imponendæ pœnæ studium visum est.* Nam ita loquitur

[h] *A posterioribus Imperatoribus Christianis*] Vide quæ infra hoc libro cap. xxiv. § 11. vide apud Nicetam Lib. I. (cap. 4) juramentum Isaaci Angeli. Idem Johannis Comneni imperium sine morte cujusquam fuisse ait. (Ibid. cap. ult.) Vide de Zenone Malchum (Excerpt. Legat. Hœschel. pag. 76) et Augustini epistolam CLVIII. et CLIX. ad Marcellinum comitem, citatum c. circumcelliones, 1. causa XXIII. quæst. 5. et capitulis sequentibus: et Chrysostomum *adversus Judæos,* ubi de Caini pœna.

[i] *In alia supplicia*] Ad opera maxime. Augustinus epistola CLX.: *alicui*

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ished no crimes with death, not even the greatest. Nor is that of Quintilian to be despised: *None will doubt that if guilty men can be brought to a good way of thinking in any way, as it is granted that sometimes they can, it would be better for the State that they should be preserved than capitally punished.* Balsamon notes that the Roman laws which enacted the punishment of death, were, by the Christian emperors, changed for the most part into other punishments, that both the condemned might be more thoroughly driven to penitence, and their punishment being prolonged, might be more profitable as example.

XIII. 1 But in the enumeration of the ends of punishment by Taurus, it appears that something was overlooked. Gellius thus quotes him: *When therefore there is either great hope that the offender will without punishment correct himself; or, on the other hand, there is no hope that he can be amended and corrected; or, there is no reason to fear that the dignity which is offended will suffer; or, the offense be not such as requires exemplary fear to correct it; then the offense does not seem to be one for which a punishment need be devised.* For he speaks as if when one end

quasi uno fine sublato tollatur pœna, cum contra omnes cessare oporteat ut pœnæ locus non sit. Deinde illum finem omittit, cum homo inemendabilis vitæ eximitur, ne plura aut graviora peccet: et quod de jactura dignitatis dixit, etiam ad alia damna, quæ metuuntur, extendendum fuit.

2 Melius Seneca cum dixit: *In vindicandis injuriis hæc tria lex sequuta est, quæ princeps quoque sequi debet*, [k] *ut aut eum quem punit emendet, aut ut pœna ejus ceteros meliores reddat, aut ut sublatis malis securiores ceteri vivant.* (De Clem. i. 22.) Nam hic si per ceteros intelligas, non minus qui læsi jam sunt, quam qui lædi adhuc possunt, plenam habebis partitionem, nisi quod ad illud *sublatis* addendum fuit, aut repressis. Nam et vincula et quæcunque est virium deminutio eo pertinet. Minus perfecta est illa alio loco ejusdem Senecæ distributio: *Hoc semper in omni animadversione servabit, ut sciat alteram adhiberi ut emendet malos, alteram ut tollat.* (Lib. i. de Ira, c. ult.) Illud Quintiliani dictum aliquanto etiam imperfectius: *Omnis pœna non tam ad delictum pertinet quam ad exemplum.* (Decl. 274.)

utili operi integra eorum membra deserviant. Vide et Nectarii epistolam ad Augustinum, quæ est CCI.

[k] *Ut aut eum quem punit emendet, aut ut pœna ejus ceteros meliores reddat*] Hæc duo etiam Philo posuit in legatione: *ὅτι καὶ ἡ κόλασις νουθετεῖ καὶ σωφρονίζει πολλάκις μὲν καὶ τοὺς ἁμαρτάνοντας· εἰ δὲ μή, πάντως γοῦν τοὺς πλησιάζοντας. αἱ γὰρ ἑτέρων τιμωρίαι βελτιοῦσι τοὺς πολλοὺς φόβῳ τοῦ μὴ παραπλήσια παθεῖν· pœna sæpe corrigit et emendat etiam eum qui peccavit: quod si id non eveniat, certe alios quorum ad notitiam pervenit: multos enim meliores faciunt aliena supplicia paris mali formidine,* (pag. 992 B.)

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of punishment is taken away, the punishment should be removed; while on the other hand, all the ends must cease to exist in order that there may be no ground for punishment. And moreover he omits that end, when a man who is unamendable is removed from life, that he may not commit more or greater crimes: and what he says of loss of dignity, is to be extended to other evils which are to be feared.

2 Seneca spoke better when he said: *In punishing wrongs, the law has had these three objects, which the prince also ought to aim at; either to amend him who is punished; or to make others better by the punishment; or to make the rest of mankind more secure by removing the bad.* For here, if by *the rest*, he means not only those who have been injured, but others who may hereafter be so, you have a complete division of the subject, except that to *removing* you should add *or repressing.* For both imprisonment, and any other way of diminishing their power, tends the same way. He has another less perfect partition in another place; as has Quintilian.

XIV. Ex his quæ dicta sunt hactenus colligi potest quam non tutum sit Christiano homini privato, sive sui, sive publici boni causa, [l]pœnam sumere de improbo quoquam, præsertim capitalem, [m]quanquam id jure gentium nonnunquam permitti diximus: unde laudandus est mos eorum populorum apud quos navigaturi instruuntur mandatis a publica potestate ad persequendos piratas, siquos in mari repererint: ut data occasione uti possint, non quasi ausu suopte, sed ut publice jussi.

XV. Cui non dissimile est quod multis in locis receptum est, [n]ut ad accusationes criminum non admittantur quibus id libet, sed certi homines quibus id muneris publica potestate impositum est: ut nihil quisquam faciat ad alienum sanguinem fundendum, nisi officii necessitate. Huc spectat Eliberinæ Synodi canon: *delator si quis exstiterit fidelis, et per delationem ejus aliquis fuerit proscriptus vel interfectus, placuit eum nec in fine accipere communionem.*

XVI. Sed et illud simul ex antedictis intelligitur, minime consultum esse homini vere Christiano, ac ne ipsum quidem

[l] *Pœnam sumere de improbo quoquam*] Vide quædam supra posita Lib. I. c. iii. § 3.

[m] *Quanquam id jure gentium nonnunquam permitti diximus*] Hoc capite, § 8.

[n] *Ut ad accusationes criminum non admittantur*] Chrysostomus *de Pœnitentia* VIII. Καλὸν μὲν οὖν, ὅπερ εἶπον, καὶ τὰς χρηματικὰς δίκας φθάνειν διαλύσεσι φιλικαῖς, ἵνα πρὸς τῷ τέλει τῆς δίκης κυβερνήσῃς τὸν φίλον. ἐγκληματικὰς δὲ μηδὲ διαλύεσθαι γένοιτο, ἀλλὰ μηδὲ τὴν ἀρχὴν ἐγγυμνάζειν· *optimum*

XIV. From what has been said, it may be collected, how unsafe it is for a private Christian man to inflict punishment, and especially capital punishment, either for the sake of his own or of the public good, upon a guilty person; although, as we have said, that is sometimes permitted by the Law of Nations. And hence we must approve of the usage of those peoples by whom navigators are provided with commissions from the public power to suppress pirates, if they find any upon the seas; on which commissions they may act, not as of their own motion, but by public command.

XV. Of much the same kind is the provision which prevails in many places, that not any body who chooses can take up the accusation of crimes, but only certain persons on whom that office is imposed by the public power; so that no one shall do any thing to shed the blood of another, except by the necessity of his office. Accordingly the canon of the Council of Seville provides, that if any one of the faithful shall turn informer, and by his means any one shall be proscribed or put to death, he shall not receive the Communion, even when dying.

decere, [o]ut ad munera publica, quæ de sanguine judicium habent, sua sponte se ingerat, jusque vitæ ac necis in cives sibi tanquam omnium excellentissimo et Deo cuidam inter homines deferri æquum existimet ac profiteatur. Nam certe quod Christus monet periculosum esse de aliis judicare, quia quale judicium in alios ferimus, tale nobis in paribus causis a Deo sit exspectandum, omnino huc etiam pertinet. *Matt.* vii. 1.

XVII. 1 Quæstio est non ignobilis, an leges humanæ quæ interfectionem quorundam hominum permittunt, interfectoribus jus verum præstent etiam apud Deum, an tantum inter homines impunitatem. Posterius hoc Covarruviæ et Fortunio placet, quorum sententia adeo displicet Ferdinando Vasquio ut nefandam vocet. Dubium non est, ut alibi quoque diximus, utrumvis legem facere posse in certis casibus. Utrum autem voluerit, partim ex verbis legis, partim ex materia intelligendum est. Nam si dolori lex indulget, pœnam humanam tollit, non vitium, ut in marito qui adulteram uxorem [p]aut adulterum occidit.

Covar. *de Matr.* Part. 2. c. 7. n. 12. Fort. *Tract. de ult. fin. leg. illat.* 2. Vasq. l. iv. *cont. ill.* c. 8.

itaque, ut dixi, etiam privatas lites antevertere benignis transactionibus, ut amicum dirigas ad id quod lites sibi propositum habent: publicorum autem judiciorum accusationes non dicam transigendo abrumpere, sed nunquam eas incipere. (Tom. VI. pag. 806.)

[o] *Ut ad munera publica, quæ de sanguine judicium habent, sua sponte se ingerat*] An sapienti capessenda sit respublica vide Senecam de otio sapientis.

[p] *Aut adulterum occidit*] Vide Augustinum *de Civitate Dei* citatum c. quicunque, 33. causa xxiii. quæstione 8.

XVI. And this too follows from what has been said, that it is not advisable for a truly Christian man, nor is even decent, that he should of his own accord mix himself with public business which involves capital punishment, and seek for a power of life and death, as if he were a sort of God among men. For certainly what Christ says, applies here, that it is dangerous to judge others, since as we judge them, God will judge us.

XVII. 1 It is a noted question, whether the human laws, which permit the slaying of certain men, really justify the slayers in the sight of God, or only give them impunity among men. Covarruvias and Fortunius hold the latter, which opinion Vasquius calls shocking. It is not doubtful, as we have said, that, in certain cases the Law can do both the one and the other. But whether the law had that intention, is to be understood partly from the words of the law, and partly from the matter. For when the law gives indulgence to human feeling, it takes away the punishment of the law, but not the sin, as in the case of a husband who kills the adulterous wife or the adulterer.

2 Si vero periculum respicit futuri mali ex dilatione pœnæ, censenda est jus ac potestatem publicam privato concedere, ita ut jam privatus non sit.

Hujus generis est lex illa in Codice Justinianeo sub rubrica, quando liceat unicuique sine judice se vindicare vel publicam devotionem, ubi cuicumque licentia datur supplicio subjugandi
Lib. i. milites populatores hac addita ratione: *melius enim est occurrere in tempore, quam post exitum vindicare. Vestram igitur vobis permittimus ultionem, et quod serum est punire judicio subjugamus edicto, ut nullus parcat militi cui obviare telo oporteat ut latroni.* Et lex subsequens de opprimendis
Lib. ii. desertoribus: *cuncti*, inquiens, *adversus latrones publicos desertoresque militiæ jus sibi sciant pro quiete communi exercendæ publicæ ultionis indultum.* Huc et illud pertinet
Apolog. c. 2. Tertulliani: [q] *In reos majestatis et publicos hostes omnis homo miles est.*

3 Atque in hoc differt jus occidendi exsules, quos bannitos vocant, ab istarum legum specie, quod ibi præcedit specialis sententia, hic generale edictum, [r] accedente facti evidentia, vim latæ sententiæ obtinet.

[Sed non sunt verba Augustini, at partim Hieronymi in Ezechiel. Cap. ix. partim alterius ignoti. *J. B.*] Et c. inter hæc 6. sequente, causa xxxiii. quæst. 2.

q *In reos majestatis et publicos hostes omnis homo miles est*] Agathias Lib. IV. (in *Orat. Rustici*) οὐ γὰρ στρατηγοῖς μόνοις ἢ τοῖς ἄλλοις δυνατωτάτοις ὁ τῆς εὐνοίας ἐθέλει σκοπὸς ἐμφύεσθαι, καὶ προσιζάνειν, ἀλλὰ παντὶ τῷ βουλομένῳ βατὸν δήπου καὶ προσῆκον τῆς ἐν ῇ τέτακται πολιτείας ὑπεραλγεῖν, καὶ τὸ κοινῇ συνοῖσον εἰς δύναμιν κατ-

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2 But if the law look to future danger from the delay of punishment, it is to be conceived to give right and public power to the private person, so that he is no longer a private man.

Of this kind is the law in the Codex under the rubric, *When it is lawful for any one without a judge to do justice for himself or for the public service;* [Cod. III. 27] where any one is allowed to suppress by force soldiers who plunder; where too the reason is added, putting such soldiers on the footing of robbers. And a similar law is given respecting deserters. As Tertullian says: *Against traitors and public enemies every one is a soldier.*

3 There is a difference in the right of killing exiles, outlawed persons: namely, that there a special opinion has preceded, but in this case, a general edict, which is combined with the evidence of the fact, and has the force of a judicial sentence.

XVIII. Nunc illud videamus, sintne omnes actus vitiosi tales ut puniri ab hominibus possint. Pro certo habendum est, non omnes esse tales. Primum enim actus mere interni, etiamsi casu aliquo, puta per confessionem subsecutam, ad notitiam aliorum perveniant, puniri ab hominibus non possunt, quia, ut alibi diximus, naturæ humanæ congruum non est ut ex actibus mere internis jus aut obligatio inter homines nascatur. Et hoc sensu accipiendum est quod dictant leges Romanæ: *cogitationis pœnam neminem mereri.* Id tamen non obstat quo minus actus interni, [s]quatenus in externos influunt, in æstimationem veniant non sui proprie, sed actuum externorum, qui inde meriti sui accipiunt qualitatem.

XIX. 1 Secundo, puniri ab hominibus nequeunt actus inevitabiles naturæ humanæ. Quanquam enim peccatum esse non potest nisi quod libere fit, ab omni tamen omnino peccato et semper abstinere supra humanam est conditionem, unde cognatum homini esse peccare inter philosophos Sopater, Hie-

ορθοῦν· non solis ducibus aliisve potentibus innasci solet atque immorari bene agendi propositum, sed cuique volenti et licet et honestum est ejus in qua vivit reipublicæ malis commoveri, et publicas utilitates pro suis viribus promovere. (Cap. 2.) Vide quæ supra hoc capite, § 9.

[r] *Accedente facti evidentia*] Quintilianus declamatione CCLX. *quædam sunt reipublicæ læsæ, ad quorum pronuntiationem oculi sufficiunt.*

[s] *Quatenus in externos influunt*] Ita Sayrus Lib. III. Thesauri, cap. 6.

XVIII. Let us now consider whether all vicious acts are such that they may be punished by men. It is certain that they are not all such. For, in the first place, mere internal acts, even if they come to be known, for instance by confession, cannot be punished by men; because, as we have said, it is not congruous to human nature that mere internal acts should give rise to right or obligation. And so the Roman law. But that does not prevent that internal acts, so far as they influence external, may not be taken into account in estimating, not themselves properly, but the external acts which receive from them their character of desert.

XIX. 1 In the next place, acts unavoidable to human nature cannot be punished by man. For though nothing is sin which is not done freely, yet to abstain from all sin and always, is above the condition of humanity; and hence sin is said to be natural to man by some of the philosophers, and by many of the Christians. See Seneca, Sopater, Philo, Thucydides, Diodorus.

In Aur. Car. Pyth. p. 192. *II. Controv.* 12. Lib. iii. 45. *De Ira*, ii. 31. Apud Stob. *Serm.* 46.

rocles, [t]Seneca, [u]inter Judæos Philo, inter historicos Thucydides, inter Christianos plurimi prodiderunt. *Si puniendus est*, inquit Seneca, *cuicumque pravum maleficumque ingenium est, pœna neminem excipiet.* Sopater vero: ἕως ἂν τις ὡς ἀναμαρτήτους κολάζῃ, τὸ μέτρον ὑπερβαίνει τῆς κατὰ φύσιν ἐπανορθώσεως· *Si quis homines puniat tanquam qui ab omni peccato vacare possint, mensuram excedit ejus quæ se-*

Lib. xiii. 21.

cundum naturam est correctionis. Quod [x]Diodorus Siculus vocat συναδικεῖν τὴν κοινὴν ἀνθρώπων ἀσθένειαν, *injurium*

Lib. xvii. 38.

esse adversus communem hominum imbecillitatem: alibi, τῆς ἀνθρωπίνης καὶ κοινῆς ἀσθενείας ἐπιλανθάνεσθαι, *oblivisci infirmitatis ejus quæ communis est humano generi.* Is quem dixi Sopater dissimulanda ait τὰ μικρὰ καὶ συνήθη τῶν ἁμαρτημάτων, *culpas minores et quasi quotidianas.*

2 Imo dubitari potest an hæc recte et proprie [y]peccata dicantur, cum libertatem quem in specie habere videntur, in

Pag. 90 A.

sua generalitate considerata, non habeant. Plutarchus *Solone:* δεῖ δὲ πρὸς τὸ δυνατὸν γράφεσθαι τὸν νόμον, εἰ βούλεται χρησίμως ὀλίγους, ἀλλὰ μὴ πολλοὺς ἀχρήστως κολάζειν· *oportet legem scribi secundum id quod obtineri potest, si*

[t] *Seneca*] Ejusdem est eodem (Lib. I.) *de Ira*, c. 14. *Nemo invenitur qui se possit absolvere.* Capite 9. dixerat, [immo Lib. II.] *inter cetera mortalitatis incommoda et hæc est caligo mentium, nec tantum necessitas errandi, sed errorum amor.* Postea cap. 27. *quis iste est qui se profitetur omnibus legibus innocentem?* et libro III. c. 26. *omnes mali sumus. De Clementia* I. 6. *Peccavimus omnes: alii gravia, alii leviora, alii ex destinato, alii forte impulsi, aut aliena nequitia ablati: alii in bonis consiliis parum fortiter stetimus, et innocentiam inviti ac renitentes perdidimus. Non delinquimus tantum, sed usque ad extremum ævi delinquemus. Etiam si quis tam bene purgavit animum, ut nihil obturbare eum amplius possit ac fallere, ad innocentiam tamen peccando pervenit.* Procopius *Gotthicorum* III. (cap. xi.) in oratione Belisarii: τὸ μὲν οὖν μηδ' ὁπωσοῦν ἁμαρτάνειν οὔτε ἀνθρώπινον καὶ τῆς τῶν πραγμάτων φύσεως ἔξω· *nihil*

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2 It may even be doubted whether those acts can properly be called sin, which, though they have an appearance of liberty, are not free, when considered in their generality. So Plutarch in *Solon*. Then again there are other acts which are inevitable, not to human nature properly, but to this particular person at this moment, on account of the constitution of the body affecting the mind, or inveterate habit; which is commonly punished, not in itself, but on account of precedent fault; because either the remedies were neglected, or the diseased thoughts willingly admitted into the mind.

XX. 1 Thirdly; those offenses are not to be punished, which neither directly nor indirectly regard human society or any other

quis velit paucos utiliter, non multos inutiliter punire. Sunt et quædam non humanæ simpliciter naturæ, sed huic et nunc inevitabilia, [y] ob corporis concretionem in animum transeuntem, aut adultam consuetudinem, quæ tamen puniri solet non tam in sese, quam [z] ob culpam præcedentem, quia aut neglecta sunt remedia, aut ultro attracti in animum morbi.

XX. 1 Tertio, punienda non sunt peccata, quæ nec directe nec indirecte spectant ad societatem humanam, aut ad hominem alterum. Ratio est, quia nulla est causa cur non talia peccata relinquantur Deo punienda, qui et ad ea noscenda est sapientissimus, et ad expendenda æquissimus, et ad vindicanda potentissimus. Quare ab hominibus punitio talis institueretur plane sine utilitate, ac proinde mendose. Excipiendæ hinc sunt pœnæ emendatoriæ, quæ causam habent ut qui peccavit melior fiat, etiamsi forte id aliorum non intersit. Puniendi quoque non sunt actus oppositi virtutibus quarum natura coactionem omnem repudiat, in quo genere sunt misericordia, liberalitas, gratiæ relatio.

2 Tractat hanc quæstionem Seneca, an ingrati vitium impunitum esse debeat; et cur non debeat, adfert multa, sed Lib. iii. *de Ben.* c. 6.

plane delinquere neque hominis est, neque id rerum fert natura. Adde Basilium Imperatorem cap. 50. (Parænetic. ad Leonem Filium.)

[u] *Inter Judæos Philo*] De Mose libro III. p. 675. c. addi potest Abenesdras ad Jobum v. 7. et Rabbinus Israel c. 8.

[x] *Diodorus Siculus*] Idem in fragmentis: μὴ συκοφαντεῖν ἀνθρωπίνης φύσεως τὴν ἀσθένειαν· *non oportet per calumniam traducere infirmitatem humanæ naturæ.* (E. Lib. XXVI. Eclog. 1.)

[9] Merito hoc rejicit et confutat PUFENDORFIUS, *De Jure Nat. et Gent.* Lib. I. cap. V. § 8. *J. B.*

[y] *Ob corporis concretionem in animum transeuntem*] Seneca *de Ira* libro II. cap. 18. *morum varietates mixtura elementorum facit, et proinde in aliquos magis incumbunt ingenia, prout alicujus elementi major vis abundavit.* Alibi hæc ea vocat, quæ attribuit conditio nascendi et corporis temperatura. Epistola XI.

[z] *Ob culpam præcedentem*] Vide c. inebriaverunt. 9. causa XV. quæst. 1.

man. The reason is, that there is no cause why such sins should not be left to God to punish, who can both know them best, and judge them most justly, and punish them most effectually. Wherefore if such a punishment were instituted, it would be useless, and therefore blameable. From this remark are to be excepted punishments for amendment, which have for their object to make the man better, though the interest of others is not concerned. Also punishments are not to be inflicted on acts opposed to those virtues of which the nature rejects all compulsion, as mercy, liberality, gratitude.

2 Seneca treats this question, Whether ingratitude ought to meet

Idem, eod. Lib. c. 7. hoc præcipuum, quod et ad alia similia extendi potest: *cum res honestissima sit referre gratiam: desinit honesta esse si necessaria est*, id est, honestatis gradum excellentem amittit, quod sequentia indicant: *non enim magis laudabit quisquam gratum hominem, quam eum qui depositum reddidit, aut quod debebat citra judicium solvit.* Mox: *non est gloriosa res gratum esse*, [a] *nisi tutum est ingratum fuisse.* Aptari ad hujus generis vitia potest illud Senecæ patris in controversiis: [b] *ego reum non laudari desidero, sed absolvi.*

XXI. Sequitur illud tractemus, an ignoscere aut veniam dare liceat interdum. [c] Negant enim Stoici, ut videre est in fragmento apud Stobæum, titulo de magistratu, in oratione Tullii pro Murena, et in fine librorum Senecæ *de Clementia*, Sen. *de Clem.* ii. 7. sed levi argumento. *Venia*, aiunt, *debitæ pœnæ remissio est: sapiens autem quod facere debet facit.* Hic fraus latet in illa voce *debitæ*. Nam si intelligas eum qui peccavit pœnam debere, id est sine injuria puniri posse, jam non

[a] *Nisi tutum est ingratum fuisse*] Idem Seneca *de Beneficiis* I. c. i. *Ita demum turpe est non reddere* (beneficia nempe) *si et licet.* Pater Seneca controversiarum v. 34. *Dicis mihi, hoc facere non oportet; huic rei æstimatio immensa est, itaque nulla vindicta est.* Augustinus Lib. II. c. 83. contra Petilianum: *sic igitur quod adversus vos leges constituta sunt, non eis bene facere cogimini, sed male facere prohibemini.* [§ 184. *Edit. Benedictin.* ubi legitur: *Si quæ igitur adversus* &c. Sed et locus non videtur recte huc aptari. *J. B.*]

[b] *Ego reum non laudari desidero, sed absolvi*] Est hoc v. contr. 33. simile libro IV. controversia 25. *Non speramus, ut probet* [Flamininum Judex], *sed ut dimittat.* Et in Excerptis VI. 8. *Multum interest objurges, an punias.* Sunt enim quædam ut Cimone ait Plutarchus: ἐλλείμματα μᾶλλον ἀρετῆς

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with impunity; and gives many reasons why it ought not [to be punished]; but this as the principal one, which may be extended to other like cases: *Since gratitude is a most graceful thing, if it be necessary it ceases to be graceful:* that is, it loses its degree of gracefulness, as appears by what follows: *We praise a grateful man only as one who returns a deposit or pays a debt without being forced:* and again, *It could not be a glorious thing to be grateful except it were safe to be ungrateful.* As Seneca the father says, *I do not want to have [such] a person praised who is accused, but to have him acquitted.*

XXI. We must now discuss whether it is ever lawful to excuse or pardon: The Stoics denied it, but with a poor argument: *Pardon is the remission of a due penalty, but the wise man does what is due.* Here the fallacy is in the word *due.* For if you understand that he who has transgressed owes the penalty, that is, may be punished without wrong, it will not follow that he who does not punish him, does

sequetur si quis non puniat, facere quod facere non debet. Si vero ita accipias debitam esse pœnam a sapiente, id est, omnino oportuisse exigi, dicemus id non semper accidere, ac propterea hoc sensu pœnam posse esse non debitam, sed licitam tantum. Atque id verum esse potest tum ante legem pœnalem, tum post eam positam.

XXII. 1 Ante legem pœnalem constitutam dubium tamen non est quin pœnæ locus esse possit, quia naturaliter qui deliquit in eo statu est, ut puniri licite possit: sed [d]non ideo sequitur debere eam exigi: quia hoc pendet ex connexione finium, ob quos pœna instituta est, cum ipsa pœna. Quare si fines illi per se morali æstimatione necessarii non sint, aut alii fines ex opposito occurrant non minus utiles aut necessarii, aut fines pœnæ propositi alia via obtineri possint, jam apparet nihil esse quod ad pœnam exigendam præcise obliget. Sit primi exemplum in peccato paucissimis cognito, cujus proinde publica traductio non necessaria sit, aut dam-

τινος, ἢ κακίας πονηρεύματα· *deliquia magis virtutis alicujus quam ex vitio crimina*, (pag. 480 A.)

[c] *Negant enim Stoici*] Contra eos bene Diodorus Siculus in fragmentis, (E. Lib. XXI. Eclog. 8) συγγνώμη τιμωρίας αἱρετωτέρα· *venia melior pœnæ exactione*. Pro Christianis sententiam dicet Cyprianus epistola LII. *alia est philosophorum et Stoicorum ratio, qui dicunt omnia peccata paria esse, et virum gravem non facile flecti oportere. Inter Christianos autem et Philosophos plurimum distat.* (Ep. LV. pag. 107. *Edit. Fell. Bremens.*)

[d] *Non ideo sequitur debere eam exigi*] Julianus *de Eusebia*: οὐδὲ γὰρ εἰ σφόδρα ἐπιτήδειοί τινές εἰσι πάσχειν κακῶς καὶ κολάζεσθαι, τούτους ἐκ παντὸς ἀπολέσθαι χρεών· *non enim, siqui sunt meriti male tractari punirique, hos perire utique necesse est.* (*Orat.* III. p. 115 B. *Ed. Spanhem.*)

not do what he ought. But if you say that the punishment is due on the part of the wise man, that is, that he ought by all means to require it, we deny that that is always the case, and therefore say that the punishment in that sense is not due, but only lawful. And that may be true both before and after the penal law.

XXII. 1 Before the penal law is instituted, it is not doubtful that punishment may have place; because by Natural Law he who has transgressed is in that state in which he may be lawfully punished; but it does not follow that punishment ought to be exacted: because this depends upon the connexion of the ends for which punishment is instituted with punishment itself. Wherefore if those ends are in moral estimation not necessary, or if these are opposed to those other ends not less useful or necessary, or if the necessary ends of punishment can be obtained in another way, it follows that there is nothing which precisely obliges to exact punishment. We may

Ad Q. fr. Ep. 1, 2. c. 2. nosa etiam: quo illud pertinet Ciceronis de Zeuxi quodam: *Adductum in judicium fortasse dimitti non oportuerit: conquiri vero ad judicium necesse non fuit.* Secundi in eo qui bene merita aut sua aut parentum repensari digna culpæ De Benef. vi. 6. opponit: nam, ut ait Seneca, [1] *beneficium superveniens injuriam apparere non patitur.* Tertii in eo qui verbis emendatus est, aut læso verbis satisfecit, ut ad eos fines pœna jam opus non sit.

2 Et hæc pars una est clementiæ a pœna liberans: quam Sap. xii. 19. respiciens Hebræus sapiens dixit: δεῖ τὸν δίκαιον εἶναι φιλάνθρωπον· *justum decet clementia.* Nam quia pœna omnis, præcipue gravior, aliquid habet quod per se spectatum non quidem justitiæ, sed caritati repugnet, facile patitur ratio ea abstineri, nisi major ac justior caritas quasi irrefragabiliter Apud Stob. Serm. 46. obstet. Appositus est ad hanc rem Sopatri locus, cum ait: τὸ περὶ τὰ συναλλάγματα τῆς δίκης ἐπανορθωτικὸν ἐκφεύγει παντελῶς τὸ τῶν χαρίτων γένος. τὸ δ' ἐπὶ τοῖς ἐγκλήμασι κείμενον οὐκ ἀναίνεται τὸ πρᾶον καὶ φιλάνθρωπον τῶν χαρίτων πρόσωπον. *justitiæ pars illa quæ contractus ad æqualitatem reducit, omnino respuit omne gratiæ genus: at ea pars quæ circa delicta occupatur, non recusat suavem et blandam gratiarum faciem.* Cujus sensus

[1] Sed in MSS. et optimis Editionibus ita locus sese habet: *Sic beneficium superveniens* INJURIA *adparere non patitur.* Quod plane alium sensum exhibet: et ne quidem secundum lectionem vitiosam verba ad rem facerent. *J. B.*

[e] *Ut in pessimi exempli sceleribus*] Josephus: πατροκτονία κοινὸν ἀδίκημα καὶ τῆς φύσεως καὶ τοῦ βίου, καὶ ὁ μὴ κολάζων ἀδικεῖ τὴν φύσιν· *parricidium*

take an example of the first case in a sin known to few, and of which the public notice is not necessary, or is even hurtful. As Cicero says of a certain Zeuxis, *Being brought to trial perhaps he ought not to be dismissed, but it was not necessary to bring him to trial.* An example of the second case is one who puts forward his own merits or those of his parents, as a set-off against his fault; so Seneca: an example of the third case, we have in him who is reformed by remonstrance, or who has satisfied the injured person by a verbal acknowledgment, so that punishment is not necessary for those ends.

2 And this is one part of the clemency which liberates the offender from punishment, of which the Hebrew wise man says, *Clemency becomes the just man.* For since all punishment has in it something opposed not to justice, but to charity, reason easily permits us to abstain from it, except some greater and juster charity

partem priorem sic expressit Cicero: *Via juris ejusmodi est quibusdam in rebus, ut nihil sit loci gratiæ:* posteriorem sic Dion Prusæensis oratione ad Alexandrinos: χρηστοῦ ἡγεμόνος, συγγνώμη· *boni præsidis est, ignoscere.* Favorino: ἡ καλουμένη χάρις παρὰ τοῖς ἀνθρώποις, τοῦτο ἔστιν ἄφεσις ἀκριβείας ἐν δέοντι· *ea quæ dicitur clementia apud homines, est tempestiva relaxatio de summo jure.* Ad Q. fr. I, 2. c. 3. Pag. 366 c. Apud Gell. i. 3.

XXIII. Possunt autem tria hæc occurrere, aut ut pœna omnino sit exigenda, [e]ut in pessimi exempli sceleribus, aut ut omnino non exigenda, ut si bonum publicum omitti eam exigat, aut ut liceat utrumvis: quo pertinet quod ait Seneca, clementiam liberum habere arbitrium. De Clem. ii. 7. Parcit tunc, inquiunt Stoici, sapiens, non ignoscit. Quasi vero nobis non liceat cum vulgo loquendi domino ignoscere vocare, quod parcere illi vocant. Nimirum et hic et alibi, ut Cicero, Galenus atque alii notarunt, magna pars Stoicarum disputationum [f]circa voces consumitur, quod philosopho apprime cavendum est. Nam ut verissime dixit scriptor ad Herennium: *vitiosum est controversiam intendere propter nominum mutationem:* Lib. ii. 28. quod Aristoteles dixerat, εὐλαβητέον τὸ πρὸς τὸ ὄνομα διαλέγεσθαι. Topic. i. 14. (17.)

XXIV. 1 Major esse difficultas videtur post legem pœ-

et naturam et vitam humanam violat, ita ut qui id non puniat et ipse in naturam peccet. (*Antiq. Jud.* XVII. § 5. *Ed. Huds.*)

[f] *Circa voces consumitur*] Extra usum, ut ait Scholiastes Horatii. Augustinus contra academicos: *turpe disputantibus in verborum quæstione immorari, cum certamen nullum de rebus remanserit.* (Cap. 2.)

oppose insurmountable obstacles. So Sopater, Cicero, Dio Prusæensis, Favorinus.

XXIII. These cases may occur: that punishment may require absolutely to be exacted, as in crimes of very bad example;—or may be fit not to be exacted, as if the public good require it to be omitted;—or either course may be allowable: when, as Seneca says, *Clemency has free will.* Then, say the Stoics, the wise man spares, but does not pardon: as if we might not, with common usage, call that *pardon,* which they call *sparing.* In fact here and elsewhere, as Cicero, Galen and others have noted, a great part of the disputations of the Stoics is about words, which a philosopher ought carefully to avoid. So the writer to Herennius and Aristotle say.

XXIV. 1 There seems to be a greater difficulty, after the penal law is instituted; because the author of the law is in a certain

nalem, quia legis auctor aliquo modo legibus suis obligatur; sed hoc diximus verum esse [g]quatenus auctor legis ut pars civitatis spectatur, non qua civitatis ipsius personam atque auctoritatem sustinet. Nam qua talis est potest legem etiam totam tollere, quia legis humanæ natura est, ut a voluntate humana pendeat, non in origine tantum, sed et in duratione. Non debet tamen legis auctor legem tollere, nisi probabili de causa, peccaturus alioqui in regulas justitiæ gubernatricis.

2 Sicut autem totam legem tollere potest, ita et vinculum ejus circa personam aut factum singulare, manente de *De Ira Dei, c. 19.* cetero lege, Dei ipsius exemplo, qui Lactantio teste, *legem cum poneret, non utique ademit sibi omnem potestatem, sed habet ignoscendi licentiam.* [h]*Imperatori,* inquit Augustinus, *licet revocare sententiam, et reum mortis absolvere et ipsi ignoscere:* causam explicat, *quia non est subjectus legibus* *De Clem. i. 5.* *qui habet in potestate leges ferre.* Seneca Neronem hoc vult cogitare: *Occidere contra legem nemo non potest: servare nemo præter me.*

3 Sed hoc quoque faciendum non est nisi causa subsit

[g] *Quatenus auctor legis ut pars civitatis spectatur*] Vide quæ supra in textu et notis hoc libro c. iv. § 12.

[h] *Imperatori licet revocare sententiam*] Symmachus, Lib. x. epist. 63. *Alia enim est conditio magistratuum, quorum corruptæ videntur esse sententiæ si sint legibus mitiores: alia divorum principum potestas, quos decet acrimoniam severi juris inflectere.* Idem discrimen inter regem et judicem est apud Themistium, oratione v. [Or. xviii.

way obliged by his own law; but this, as we have said, is true so far as the author of the law is considered as a part of the State, but not so far as he bears the character and authority of the State. For in that capacity, he may rescind the whole law, because the nature of human law is, that it depends on human will, not only in its origin, but in its duration. But yet the author of the law ought not to abolish it, except for a probable cause, since otherwise he offends against the rules of governmental justice.

2 But as he may take away the whole law, so may he remove its obligation with regard to a particular person or fact, the law for the rest remaining; following the example of God himself, who, as Lactantius says, *when he established the law did not deprive himself of the power of pardon.* So Augustine, and Seneca in the character of Nero.

3 But this also is not to be done except there be a probable cause. What are probable causes, although it cannot be precisely defined, yet we must hold by this, that they ought to be greater

probabilis: quæ autem sint causæ probabiles, quanquam non potest præcise definiri, tenendum tamen est, majores esse debere post legem, quam quæ ante legem spectabantur, quia legis auctoritas, quam servari utile est, ad causas puniendi accessit.

XXV. Causæ autem liberandi aliquem a pœna legis solent esse aut intrinsecæ, aut extrinsecæ. Intrinseca, cum si non injusta, dura tamen est pœna ad factum comparata.

XXVI. Extrinseca, ex merito aliquo, aut alia re commendante: aut etiam spe magna in posterum: quod causæ genus tunc maxime sufficiet, si ratio legis saltem particulariter cesset in facto de quo agitur. Nam quanquam ad sustinendam legis efficaciam satis est ratio universalis sine repugnantia contrariæ rationis, [1] tamen cessatio rationis, etiam quæ particularis est, efficit ut lex facilius et minore cum damno auctoritatis solvi possit. Id autem maxime usu venit in iis delictis quæ per ignorantiam, quamvis culpa omni non carentem, aut per animi infirmitatem superabilem quidem sed difficulter superabilem, committuntur: ad quæ Christianus homi-

pag. 227, 228. *Ed. Harduin.* Locus, qui tamquam ex Augustino adfertur, non est illius Patris, quamquam millies sub ipsius nomine laudatus, et a multis Auctoribus; sed illius qui *Quæstiones Vet. et N. Testamenti* scripsit, Quæst. *De Fato* 115. Appendic. Tom. III. Opp. Aug. *Ed. Benedictin.*]

[1] *Tamen cessatio rationis, etiam quæ particularis est, efficit ut lex facilius et minore cum damno auctoritatis solvi possit*] Multa ad hanc rem utilia congessit Gratianus causa I. quæstione 7.

after the law, than were regarded before the law; because the authority of the law, which it is important to preserve, has been added to the other causes of punishment.

XXV. The causes of liberating any one from the punishment of the law, are commonly either intrinsic or extrinsic: an intrinsic cause is when the punishment, though not unjust, is severe compared with the fact.

XXVI. An extrinsic cause of remission of punishment is that which arises from some merit or other thing commending the offender to mercy; or from a great hope of him in future; which kind of cause will then be of most avail, if the reason of the law, at least in a particular point, ceases as to the fact in question. For although to sustain the efficacy of the law, the universal reason suffices, there being no repugnant contrary reason; yet the cessation of the reason for the particular case, effects that the law may be more easily, and with less loss of authority, loosened. And this happens most in

num rector maxime respicere debet, ut Deum imitetur, qui in veteri quidem fœdere multa talia hostiis quibusdam expiari voluit. Levit. iv. et v. at in novo fœdere verbis et exemplis testatus est se ad talia resipiscentibus condonanda esse facilem. Lucæ xxiii. 34; Hebr. iv. 15, v. 2; 1 Timoth. i. 13. Et quidem illis Christi apud Lucam verbis, *condona illis, Pater, quia nesciunt quid faciant*, [k]adductum Theodosium ut Antiochenis ignosceret, notat Johannes Chrysostomus.

Lib. i. 46. XXVII. Atque hinc apparet quam male Ferdinandus Vasquius dixerit, justam causam dispensandi, id est lege solvendi, esse eam tantum de qua legis auctor consultus dixisset, extra mentem suam esse eam observari. Non distinxit enim inter ἐπιείκειαν, quæ legem interpretatur, et inter relaxationem. Lib. i. 26. et 46. Unde et alibi Thomam et Sotum reprehendit, quod dicant legem obligare etiamsi causa particulariter cesset, quasi legem esse putassent solam scripturam, quod illis nunquam in mentem venit. Tantum vero abest ut omnis legis relaxatio, quæ sæpe libere et dari et omitti potest, referenda sit ad ἐπιείκειαν proprie dictam: ne illa quidem relaxatio

[k] *Adductum Theodosium*] Historiam vide apud Zonaram. (Lib. xiii. cap. 18. Confer quæ Auctor adfert infra, cap. xxiv. hujus Libri, § 3. num. 1 in Not.).

[l] *Puniendus nemo est ultra meritum*] Bene hac de re disserunt Mediolanenses

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those offenses which are committed through ignorance, though not free from all fault; or through infirmity of mind, superable indeed, but yet difficultly superable. To these, the Christian ruler ought mainly to look, that he may imitate God, who in the Old Testament gives testimony by word and by deed that he is indulgent in forgiving such. [See the passages.] And that by those words of Christ, *Father, forgive them; for they know not what they do*, Theodosius was moved to pardon the Antiochians, is noted by John Chrysostom.

XXVII. And hence it appears how ill Vasquius said, that a just cause of dispensing with, that is of relaxing the law, was such alone as one about which, if the author of the law had been consulted, he would have said that it was not in his mind to have it observed. Here he has not distinguished between the *equity* which interprets the law, and a relaxation of it. And on this ground he elsewhere reproaches Thomas Aquinas and Sotus, for saying that the law obliges, even though the cause in particular ceases, as if they had thought that the law was only the written word, which never came into their minds. For so far is it from being the case that any relaxation of the law, which may often be freely either given

quæ aut ex caritate aut ex justitia rectrice debetur, eo referri potest. Aliud enim est legem aut probabili aut etiam urgente causa tollere, aliud declarare factum ab initio mente legis non fuisse comprehensum. De tollendis pœnis vidimus, de taxatione earum videamus.

XXVIII. Ex supra dictis apparet in pœnis duo spectari, id ob quod, et cujus ergo. Ob quod, est meritum; cujus ergo, est utilitas ex pœna. [1]Puniendus nemo est ultra meritum, quo ea pertinent quæ ex Horatio jam ante protulimus; § 2. n. 2.
et Ciceronis illud, *est pœnæ modus sicut rerum reliquarum, et quædam mediocritas.* Ideo pœnam æstimationis nomine appellat Papinianus. Et Aristides *Leuctrica* secunda humanæ naturæ conveniens esse ait, ut in quoque crimine sit aliquid ultra quod vindicta procedere non debeat. Demosthenes vero, in epistola pro Lycurgi liberis, æqualitatem in pœna non ita nude spectandam ait, ut in ponderibus et mensuris, sed expenso proposito ac voto ejus qui deliquit. Intra meriti vero modum magis aut minus peccata puniuntur, pro utilitate.

Epist. XV. *ad Brut.*

L. Sanct. 41. *D. de Pœn.*

Leuctr. 1. p. 94 c. Tom. II.

p. 114 B.

in oratione quæ apud Guicciardinum est libro XVII. (pag. 387, *et seqq.*) Confer quæ hoc capite habuimus § 11. et quæ habituri sumus libro III. cap. XI. § 1.

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or omitted, is to be referred to *equity*, that even that relaxation which is due to charity or to governmental justice is not to be referred to that principle. For it is one thing to take away the law for a probable, or even for an urgent cause, and another to declare that the fact was from the beginning not comprehended in the mind of the law.

We have spoken hitherto of taking away punishments, let us now consider their apportionment.

XXVIII. From what has been said above, it appears that two things are regarded in punishments; for what, and on account of whom. For what, is a question of merit; on account of whom, is a question of the use of the punishment. No one is to be punished beyond his desert, as Horace and Cicero say: accordingly, Papinian calls punishment the valuation [of an offense]. Aristides says that it is suitable to nature that there should be some point beyond which punishment shall not proceed; Demosthenes says that equality of punishment [and crime] is not to be regarded nakedly as in weights and measures, but with estimation of the purpose and intention of the offender. Within the limit of this desert, crimes may be punished more or less, according to utility.

XXIX. 1 In merito examinanda veniunt [m] causa quæ impulit, causa quæ retrahere debuit, et personæ idoneitas ad utrumque. Vix quisquam gratis malus est, aut si quem malitia propter seipsam delectat, is ultra modum humanum processit. Pars maxima ad peccandum ducuntur affectibus; *Jac. i. 15.* ἡ ἐπιθυμία συλλαβοῦσα τίκτει ἁμαρτίαν· *appetitus concipiens parit peccatum.* Appetitus nomine jam et declinandi mali impetum comprehendo, qui maxime est naturalis, ideoque inter appetitus honestissimus: unde quæ mortis, carceris, doloris, aut summæ egestatis vitandæ causa injuste fiunt, maxime excusabilia videri solent.

Orat. in Steph. I. p. 616 B. 2 Et huc illud Demosthenis pertinet: *æquum est, his qui, cum divites sint, mali sunt, magis irasci, quam his quos egestas impellit: nam apud humanitate utentes judices necessitas aliquid adfert veniæ, cum si qui in rerum affluentia injusti sunt, nihil habeant prætexti probabilis.* Sic Acarnanas excusat Polybius quod, impendentis periculi respectu[2], federis cum Græcis in Ætolos initi leges non implessent. *Lib. iv. 30.* Aristoteles: ἑκουσίῳ μᾶλλον ἔοικεν ἡ ἀκολασία *Ethic. Nic. iii. 15.*

m *Causa quæ impulit*] Chrysostomus x. *de Statuis:* οὐ γὰρ δὴ πᾶν ἁμάρτημα τὴν αὐτὴν φέρει κόλασιν ἀλλὰ τὰ εὐκατόρθωτα μείζονα ἡμῖν ἐπάγει τὴν τιμωρίαν· *non enim omnis culpa eandem pœnam meretur, sed graviorem illa quæ facile corrigi potuit.* (Tom. vi. p. 531.) Et in secunda oratione cur obscurum sit vetus testamentum, hinc probat calumniatorem pejorem esse scortatore, fure, homicida. (Tom. vi. pag. 667. *Ed. Savil.*)

2 Parum adcurate hoc dicitur. Inspice locum, in ora libri a me distincte indicatum. *J. B.*

n *Dolor autem hominem quasi extra se rapit*] Vide egregiam comparationem furis et adulteri Proverbiorum vi. 30. *et seqq.*

o *Ideo plus habet voluntarii*] Philo *ad Decalogum:* πάντα μὲν γὰρ τῆς ψυχῆς πάθη χαλεπὰ, κινοῦντα καὶ σείοντα αὐτὴν παρὰ φύσιν, καὶ ὑγιαίνειν οὐκ ἐῶντα. χαλεπώτατον δ' ἐπιθυμία· διὸ τῶν μὲν ἄλλων ἕκαστον θύραθεν ἐπεισίον καὶ προσπίπτον ἔξωθεν, ἀκούσιον εἶναι δοκεῖ· μόνη δ' αὐτὴ ἐπιθυμία τὴν ἀρχὴν ἐξ ἡμῶν λαμβάνει καὶ ἔστιν ἑκούσιος· *omnes quidem animi perturbationes graves, ut quæ animum extra na-*

XXIX. 1 In examining desert, these points come under consideration; the cause which impelled, the cause which ought to have withheld, and the fitness of the person to each. [First of the impelling cause.] Scarce any one is wicked for nothing: if there be any person whom wickedness delights on its own account, he has gone beyond the limits of humanity. The greater part of persons are led to sin by the affections: *When desire hath conceived it bringeth forth sin,* James i. 15. Under the name of desire, I include also the impulse to shun evil, which is most natural, and therefore the most decent of the appe-

τῆς δειλίας· ἡ μὲν γὰρ δι' ἡδονὴν, ἡ δὲ διὰ λύπην. καὶ ἡ μὲν λύπη ἐξίστησι, καὶ φθείρει τὴν τοῦ ἔχοντος φύσιν· ἡ δὲ ἡδονὴ οὐδὲν τοιοῦτον ποιεῖ, μᾶλλον δὲ ἑκούσιον· *magis voluntaria est incontinentia, quam timiditas: nam illa voluptatis ergo, hæc propter dolorem.* [n]*Dolor autem hominem quasi extra se rapit, naturæ exitium adferens: voluptas nihil tale,* [o]*ideo plus habet voluntarii.* In eundem sensum insignis est [p]locus apud Porphyrium, de non esu animalium libro tertio. Pag. 291.

3 Ceteri appetitus ad bonum aliquod tendunt, aut verum, aut imaginabile. Vera bona extra virtutes et earum actiones quæ ad peccatum non ducunt (ἀντακολουθοῦσι γὰρ αἱ ἀρεταὶ, [3]*consentiunt enim virtutes inter se*) sunt aut delectantia, aut delectantium causa, quæ utilia vocantur, ut possessionum abundantia. [q]Imaginabilia non autem vere bona sunt, excellentia supra alios quatenus a virtute et utilitate sejungitur, et vindicta: quæ quo magis a natura abeunt, eo sunt fœdiora. Et hos tres appetitus Johannes his vocibus exprimit: ἐπιθυμία σαρκὸς, ἐπιθυμία τῶν ὀφθαλμῶν, ἀλα- 1 *Joh.* ii. 16.

turalem statum moveant atque concutiant, [neque sanum esse sinant] sed omnium harum gravissima est cupido: nam cetera, quia extrinsecus ad nos impetum faciunt nosque pulsant, videntur velut invitis evenire: at sola cupido, utpote ex nobis intus ortum habens, magis spontis esse nostræ videtur. (Pag. 764 C.)

p *Locus apud Porphyrium*] Et similis apud M. Antoninum de vita sua libro II. (§ 10. *Ed. Gatak.*) ubi iram et cupiditatem inter se confert. Plutarchus *Romulo:* ἡ δὲ κινήσασα τὸν θυμὸν ἀρχὴ μᾶλλον παραιτεῖται τὸν ὑπὸ μείζονος αἰτίας, ὥσπερ ὑπὸ πληγῆς χαλεπωτέρας, ἀνατραπέντα· *Commovens animum causa plus excusationis ei præstat, qui ex graviore causa, velut ictu validiore, evertitur.* (Pag. 38 A.)

3 Axioma Stoicorum, apud DIOGENEM LAERTIUM, Lib. VII. § 125.

q *Imaginabilia non autem vere bona sunt*] Seneca *Epist.* XVI. *naturalia desiderio finita sunt: ex falsa opinione nascentia, ubi desinant, non habent.* Vide Chrysostomum in tractationibus moralibus ad Rom. vi. ad II. Cor. xi. 12. ad Ephes. i. 14.

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tites. Hence what is done wrongly to avoid death, imprisonment, pain, or extreme want, is commonly held most excusable.

2 And so Demosthenes, Polybius, Aristotle, Porphyry.

3 Other appetites tend to some good, either imaginary or real. True good, is, besides the virtues and their actions which do not tend to sin, either things which delight, or the cause of delight, which is called utility, as abundance of possessions. Imaginary goods, not real, are superiority over others, so far as it is separate from virtue and utility, and revenge. These three appetites St John calls *the lust of the flesh, the lust of the eyes, and the pride of life.* The first compre-

ζουεία τοῦ βίου. Primum enim membrum voluptatem desideria, secundum habendi cupiditatem, tertium vanæ gloriæ consectationem et iracundiam complectitur. Philo in Decalogi explicatione omnia mala esse dicit, ἐξ ἐπιθυμίας ἢ χρημάτων ἢ δόξης ἢ ἡδονῆς. Lactantius libro sexto: *virtus est iram cohibere, cupiditatem compescere, libidinem refrænare. Nam fere omnia quæ fiunt injuste atque improbe, ab his oriuntur affectibus:* quod et alibi repetit.

Pag. 765 E. Cap. 5.

XXX. 1 Causa, quæ a delinquendo abstrahere debet, generalis est injustitia. Versamur enim non in quibusvis peccatis; sed in iis quæ respectum habent extra peccantem. Injustitia eo est major quo majus alteri damnum infertur. Ideo primum locum obtinent delicta consummata, postremum quæ ad actus aliquos sed non ad ultimum processerunt: in quibus tanto quidque est gravius, quo ulterius processit. In utrovis genere ea injustitia eminet, quæ communem ordinem perturbat, ac proinde plurimis nocet. Sequitur ea quæ singulos tangit. Maxima hic est quæ vitam: proxima quæ

[r] *Interdum et aliud accedit vitium*] Vide locum insignem in Lucæ verbis apud Xiphilinum ex Dione. [In Editionibus præcedentibus, loco vocum illarum, *Lucæ verbis*, positum fuerat, *Lucii vita.* Nimirum Editores putaverant ita emendandum locum, quum nescirent quid sibi vellet. Hi tamen simul monere debuerant, quis sit ille Lucius, ad cujus Vitam, a Xiphilino scriptam, Auctorem nos amandare voluerunt. Est quidem heic mendum, sed in sola voce *Lucæ:* quod nos detexisse speramus. Nimirum in animo habuit Auctor, quod de Avidio Cassio dicit Marcus Antoninus, in Oratione ad Milites habita, ubi eo atrociorem esse ejus rebellionem demonstrat, quod violaverit jura amicitiæ, φιλίαν ὑπερβάντα. Vide reliqua, pag. 277 B. C. *Ed. II. Steph.* Sensus ille, ut qui-

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hends the desire of pleasure, the second, cupidity of having, the third, the pursuit of vain glory, and anger. Philo says that all evil comes of the desire of wealth, glory, or pleasure. So Lactantius.

XXX. 1 [Second, of the withholding cause.] The general cause which ought to withhold men from offending is justice. [Hence injustice is a measure of punishment.] The injustice is the greater as the greater damage is done to any one. Therefore the first place belongs to consummated crimes; the next, to those which have proceeded to some acts, but not to the last; and among these, everything is the more grievous in proportion as it has gone further. In each class, that injustice has an eminent place which disturbs the common order, and therefore hurts the greatest number; that comes after, which affects individuals. The greatest offense here is that which affects life; the next, family, of which the foundation is matrimony; the last, desirable objects, either directly by subtracting them,

familiam, cujus fundamentum est matrimonium: postrema quæ res singulas expetibiles spectat, sive directe subtrahendo, sive dolo malo causam dando damni.

2 Possunt hæc ipsa subtilius dividi, sed quem indicavimus ordinem Deus in decalogo secutus est. Nam parentum nomine, qui naturales sunt magistratus, etiam alios rectores par est intelligi, quorum auctoritas societatem humanam continet: sequitur interdictio homicidii: deinde matrimonii sanctia, inhibitis adulteriis: tum furta, et falsimoniæ: loco ultimo delicta inconsummata. Inter causas autem abstrahentes non debet poni tantum qualitas ejus quod directe fit, sed et ejus quod secuturum probabile est, ut in incendio et perfosso aggere multorum summæ calamitates et mortes etiam spectandæ sunt.

3 Ad injustitiam, quam generalem causam posuimus, [r]interdum et aliud accedit vitium, puta impietas in parentes, inhumanitas in propinquos, ingratus animus in beneficos, quæ augent delictum. Apparet quoque major pravitas [s]si quis

vis videt, omnino ad rem, de qua agitur, facit. Auctor voluerat dicere *in Marci verbis:* sed incogitantia quadam, orta ex adfinitate nominum familiarium, quibus duo Evangelistæ gaudent, vel Auctor ipse, vel Exscriptor, Lucam pro Marco nobis obtulerunt, ut habent Editiones vivo Auctore in lucem emissæ, et illa etiam anni 1646. post obitum ejus prima. *J. B.*]

[s] *Si quis sæpius deliquit*] Τὸ μὲν γὰρ ἀγνοῆσαί ποτε τὰ κατὰ τὸν βίον ἐστὶν ἀνθρώπου· τὸ δὲ ἐπὶ τοῖς αὐτοῖς πράγμασι πλεονάκις ἁμαρτάνειν, τέλεον ἐξεστηκότος τοῖς λογισμοῖς· ὅσῳ γὰρ πλείοσιν ἐλαττώμασι περιπεπτώκαμεν, τοσούτῳ μείζονος τιμωρίας ἄξιοι τυχεῖν ὑπάρχομεν· *aliquando ignorasse quod vita exigat, hominis est: at in iisdem rebus sæpius aberrare, emotæ est*

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or by producing damage through wrong doing.

2 These matters might be divided more subtilly; but the order which we have indicated is that which God has followed in the Decalogue. [The fifth commandment includes duties to governors]; for by the name of parents, who are natural magistrates, other rulers also must be understood: then follows the interdiction of homicide; then the sanction of matrimony by the prohibition of adultery; then theft; then false witness; in the last place, sins unconsummated.

Among the withholding causes, ought to be put, not only the character of that which is directly done, but of that which will probably follow: as in setting fire to a house, or breaking down a dam, great calamity, and even deaths, are to be looked for.

3 To the injustice which we put as the general cause, there is often added some other vice, as impiety towards parents, inhumanity towards neighbours, ingratitude towards benefactors; which increases the

sæpius deliquit: quia habitus mali actibus sunt pejores. Et hinc intelligi potest quatenus natura æquum sit quod apud Persas fiebat, [t] ut vita anterior simul cum delicto in æstimationem veniret. Id enim locum habere debet in his quibus alioqui non malis subito aliqua peccandi dulcedo subrepsit: non in his qui totum vitæ genus immutarunt, in quibus ipse

Cap. xviii. Deus apud Ezechielem nullam se habere ait prioris vitæ ratio-

Lib. i. 86. nem, quibusque adeo Thucydideum illud aptari potest: *διπλασίας ζημίας ἄξιοί εἰσιν, ὅτι ἀντ' ἀγαθῶν κακοὶ γεγένηνται· dupliciter pœnas merentur, eo quod ex bonis mali*

Lib. iii. 67. *facti sunt.* Quod et alibi dixit: *ὅτι οὐκ ἐκ προσηκόντων ἁμαρτάνουσι· quia ipsos peccare minime decebat.*

4 Itaque optime Christiani veteres in pœnis canonum æstimandis [u] non nudum delictum voluerunt aspici, sed simul vitæ quod præcessit et quod sequitur; ut ex Ancyrana et

Rom. vii. 13. aliis Synodis videre est. Sed et lex posita adversus vitium specialem quandam malitiam veteri superaddit: quod ita docet

De Ver. Rel. c. 6. Augustinus: [x] *lex prohibens omnia delicta congeminat: non*

mentis: quo enim plura sunt in quæ incidimus delicta, hoc majorem pœnam commeremur. [Diod. Sic. e Lib. xxi. Eclog. 15.]

[t] *Ut vita anterior simul cum delicto in æstimationem veniret*] Asinius Pollio: [apud Senec. Suasor. vi. paullo ante versus Corn. Severi.] *qua major pars vitæ atque ingenii stetit, ea judicandum de homine est.* Cicero *pro Sul. Omnibus in rebus, judices, quæ graviores majoresque sunt, quid quis voluerit, cogitarit, admiserit, non ex crimine, sed ex moribus ejus, qui arguitur, est ponderandum.* (Cap. 25.)

[u] *Non nudum delictum voluerunt aspici*] Canon Ancyranus xxv. Chrysostomus ad ii. ad Corinthios, cap. ii. *ὅθεν μανθάνομεν, ὅτι οὐ δεῖ μόνον πρὸς τὴν φύσιν τῶν ἁμαρτημάτων, ἀλλὰ καὶ πρὸς τὴν διάνοιαν καὶ τὴν ἕξιν τῶν ἁμαρτανόντων τὴν μετάνοιαν ὁρίζειν· unde discimus pœnitentiæ fines determinandos non sola delictorum natura inspecta, sed et propositi et moris eorum qui peccarunt.* (Tom. iii. p. 569.) Idem

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offense. Also there appears a greater pravity, if any one has often offended: because bad habits are worse than bad acts. And hence it may be understood how far that was by nature equitable, which was practised among the Persians, that the anterior life was taken into account along with the offense. That may be applied, where a person, not otherwise bad, has been overcome by some sudden temptation: but not in those who have changed their whole course of life, in whom God says he will not regard the former life (Ezek. xviii.*). So Thucydides.

4 The ancient Christians, in assigning punishment by the canons,

* The principal part of the passage rather refers (see v. 10) to the son being bad when the father has been a good man. W.

enim simplex peccatum est non solum malum, sed etiam vetitum committere. Tacitus: *si velis quod nondum vetitum est, [4]timeas ne vetere: at si prohibita impune transcenderis, neque metus ultra, neque pudor est.* *Ann.* iii. 54.

XXXI. 1 Personæ aptitudo, aut ad considerandas causas avertentes, aut ad suscipiendos affectus incitantes, considerari solet in corporis mixtura, ætate, sexu, educatione, circumstantiis actus. Nam et pueri, et feminæ, et crassi ingenii homines, maleque educati, justi et injusti, liciti et illiciti discrimina minus habent cognita: et in quibus bilis prævalet, iracundi sunt, in quibus sanguis, ad venerem proni; tum vero huc juventus, illuc senectus propendet. Andronicus Rhodius: φαίνεται τοίνυν ὅτι ἀπολογίαν τινὰ δίδωσι τοῖς αἰσχροῖς, τὸ πεφυκέναι πρὸς αὐτά, καὶ ἀνεκτότερον ποιεῖ τὸ ἔγκλημα· *videtur factis turpibus excusationis aliquid adferre natura, et delictum efficere tolerabilius.* Metum accendit mali imminentis cogitatio, et iracundiam recens ac needum sedatus dolor, ita ut rationem audiri vix sinant: suntque illorum affectuum delicta *Paraph. in Eth. Nic.* vii. 10. p. 444.

II. *de Sacerdotio*: οὐ γὰρ ἁπλῶς πρὸς τὸ τῶν παραπτωμάτων μέτρον δεῖ καὶ τὴν ἐπιτιμίαν ἐπάγειν. ἀλλὰ καὶ τῆς τῶν ἁμαρτανόντων στοχάζεσθαι προαιρέσεως, *non enim ad solam mensuram delictorum pœna imponenda est, sed et inquirendum quis fuerit ejus qui peccavit animus.* (Tom. VI. pag. 10.)

[x] *Lex prohibens omnia delicta congeminat*] Bene Chrysostomus: ἐνταῦθα οὐ μόνον ἰσοτιμίαν δείκνυσι Ἰουδαίου καὶ Ἕλληνος, ἀλλὰ καὶ πολὺ τὸν Ἰουδαῖον βαρούμενον ἀπὸ τῆς τοῦ νόμου δόσεως· *hic non tantum par jus dignitatemque ostendit Judæi et Græci, sed et Judæum hoc ipso prægravari quod legem acceperit.* (Ad Roman. pag. 32. Tom. III.) Deinde: ὁ γὰρ πλείονος ἀπολαύσας τῆς διδασκαλίας, μείζονα ἂν εἴη καὶ τιμωρίαν ἄξιος ὑπομεῖναι παρανομῶν. *Nam qui plus institutionis accepit, is majores etiam contemtæ legis pœnas meretur.* (Ibid. pag. 30.)

[4] Locus iste Taciti, recte expensus, nil ad rem facit. *J. B.*

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rightly directed, not the naked delict to be regarded only, but at the same time the preceding and succeeding life. A law directed against a special sin, if violated, adds a degree of depravity to that which the sin by itself would not have. So Augustine, Tacitus.

XXXI. 1 [Third, as to the aptitude of the person.] The aptitude of the person, either to consider the withholding causes, or to feel the power of the impelling affections, may be considered as to his constitution, age, sex, education, and the circumstances of the act. For children, women, persons of dull intellect, ill educated persons, are less able to perceive the differences of just and unjust, of lawful and unlawful: those in whom bile prevails are irascible; those in whom blood, lustful; and youth tends to one of these ways,

merito minus odiosa quam quæ ex voluptatis nascuntur desiderio, quod et minus efficaciter movet, et differri [y] et aliam sibi materiam sine injuria quærere facilius potest. Aristoteles Nic. vii. 7. *Nicomachiorum* septimo: ὁ θυμὸς φυσικώτερον καὶ ἡ χαλεπότης τῶν ἐπιθυμιῶν τῶν τῆς ὑπερβολῆς καὶ τῶν μὴ ἀναγκαίων· *magis naturale ira et acerbitas quam cupiditas eorum quæ modum excedunt minimeque sunt necessaria.*

2 Omnino enim illud tenendum est, quo animi eligentis judicium magis impeditur, quoque magis naturalibus causis, Cap. 6. eo quod delinquitur minoris esse. Aristoteles dicto libro: μᾶλλον ἀκόλαστον ἂν εἴποιμεν, ὅστις μὴ ἐπιθυμῶν ἢ ἠρέμα διώκει τὰς ὑπερβολὰς καὶ φεύγει μετρίας λύπας, ἢ τοιοῦτον ὅστις διὰ τὸ ἐπιθυμεῖν σφόδρα. τί γὰρ ἂν ἐκεῖνος ποιήσαιεν, εἰ προσγένοιτο ἐπιθυμία νεανικὴ, καὶ περὶ τὰς ἀναγκαίων ἐνδείας λύπη ἰσχυρά· *minus temperantem dicimus hunc, qui a motu concupiscente aut non tentatus, aut leviter tentatus quærit enormes voluptates aut mediocria incommoda defugit, eo qui vehementi affectu percellitur. Nam quid idem ille facturus fuisse putandus est, si adfuisset juvenilis quædam perturbatio animi, aut gravis dolor ex penuria eorum quibus* Apud Stob. Tit. 2. *negatis natura doleat?* Quicum convenit illud Antiphanis:

[y] *Et aliam sibi materiam sine injuria quærere facilius potest*] Chrysostomus ad Galatas: ἡ ἐπιθυμία μίξιν ἐπιζητεῖ μόνον, οὐ τοιάνδε μίξιν· *cupido concubitum tantum quærit, non hujus aut illius concubitum.* (Tom. III. pag. 753.) Tertullianus libro II. *ad Uxorem: nam quanto grandis est continentia carnis quæ viduitati ministrat, tanto, si non sustineatur, ignoscibilis videri potest: difficilium enim facilis est venia. Quanto autem nubere in Domino perpetrabile est, uti nostræ potestatis, tanto culpabilius est non observare quod possis.* (Cap. 1.) et mox, *quanto potestas vitandi fuit, tanto contumaciæ crimine oneratur.* (Cap. III.) Adde M. Antoninum, loco modo indicato, ubi Theophrasto auctore utitur.

[z] *Qui cum sit opulens nequiter quic-*

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age, the other. Andronicus speaks of such palliations. Then again fear is augmented by the thought of imminent danger; anger, by recent and still smarting vexation; so that they scarce suffer reason to be heard: and transgressions which thus arise are deservedly less odious than those which spring out of the desire of pleasure, which is both slower in its impulses, and may more easily be put off and led to seek other matter. Aristotle discusses this question, *Eth. Nicom.* VII. 7.

2 This also is to be held, that in proportion as the judgment of the person choosing his course is more impeded, and by mere natural causes, the offense is less. So Aristotle in the same place. Anti-

[z]Qui cum sit opulens nequiter quicquam facit,
Hunc, si esset pauper, quid non facturum putas?

Et quæ in senum amores passim in comœdiis legimus. Ex his igitur causis æstimandum meritum intra quod pœna consistere debeat.

XXXII. 1 Tenendum autem est quod Pythagorici dicebant, justitiam esse [a]*τὸ ἀντιπεπονθὸς*, id est, parem passionem in pœnis, id non ita accipi debere quasi qui alteri nocuit deliberato et sine causis culpam valde minuentibus, tantundem nocumenti nec amplius ferre debeat. Id enim non ita esse ipsa lex, quæ legum omnium perfectissimum exemplar est, ostendit, *Exod.* xxii. 1. cum furta quadruplo aut quintuplo vult lui. Et lege Attica fur, [b]ultra dupli condemnationem, per dies aliquot vinctus habebatur, ut Demosthenes in Timocratem nos docet. *Leges,* Pag. 476 c. inquit Ambrosius, *ea quæ detracta sunt alicui cum injuria* Offic. iii. 3. *personæ aut rei ipsius cumulo restitui imperant, quo furem a detrahendo aut pœna deterreant, aut mulcta revocent.* Aristides *Leuctrica* secunda: *τοῖς ἐν δικαστηρίοις ἐπεξιοῦσι,* Tom. II. p. 133 c. *τοῖς ἀδικήσασι μείζονα ἢ καθ' ἃ πεπόνθασι δέδοται περὶ τῶν νόμων εἰς τιμωρίας λόγον· his qui judicio illatas sibi injurias persequuntur, majora leges permittunt pro vindicta*

quam facit] Chrysostomus *de Providentia* IV. [Immo V. pag. 878. Tom. VI.] *ὥστε ὅταν ἴδῃς τὸν πλουτοῦντα ἀδικοῦντα, πλεονεκτοῦντα, ἁρπάζοντα, διὰ τοῦτο μάλιστα αὐτὸν στέναξον, ἐπειδὰν πλούσιος ὢν ταῦτα ποιεῖ. μείζονα γὰρ δίδωσι τιμωρίαν· quare ubi divitem videris injustum, avarum, rapacem, hoc magis eum miserare, quod talia dives faciat. Ob id ipsum enim punietur gravius.*

[a] Τὸ *ἀντιπεπονθὸς*] Ταυτοπάθεια *Harmenopulo.* (Prompt. Lib. I. Tit. 2. § 34.)

[b] *Ultra dupli condemnationem*] Alludit huc locus Apoc. xviii. 6. *Reddite duplum.* Hercules Minyas, qui a Thebanis sine jure tributum extorserant, duplum coegit ejus tributi pendere Thebanis. Apollodorus Lib. II. (cap. 3. § 11.)

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phanes; and old men in love, in comedies. And by these principles we must estimate the limiting amount of punishment according to desert.

XXXII. 1 We must remark that the doctrine of the Pythagoreans, that justice is *a reciprocal proportion,* is not to be so understood as if he who has deliberately and without extenuating causes, injured another, should himself receive so much harm, and no more. That this is not so, the Hebrew law shews, when it directs thefts to be punished by forfeit to four or five times the amount. By the Attic Law, the thief, besides a fine of the double, was kept in bonds some days. So Ambrose, Aristides, Seneca.

exigere, quam quæ ipsis acciderant. Seneca de judicio post hanc vitam:

> Scelera taxantur modo
> Majore nostra.

Lib. xv. p. 710. 2 [c]Apud Indos, ut Strabo notat, qui quem mutilasset, supra talionem, manu truncabatur. Et in *Magnis Moralibus* Lib. i. 34. quæ Aristotelis nomen præferunt, legimus: *οὐ δίκαιον, εἴ τις τὸν ὀφθαλμὸν ἐξέκοψέ τινος, ἀντεκκοπῆναι μόνον, ἀλλὰ πλείονα παθεῖν· justum est si quis oculum alteri effoderit, non tantundem modo, sed et amplius patiatur.* Nec enim æquum est ut par sit periculum innocentis et nocentis, ut recte ostendit [d]Philo, quo loco de homicidii pœna tractat. Atque hoc inde quoque æstimari potest, quod delicta quædam [e]non consummata, et ideo consummatis minora, nocumentum infligant Deut. xix. 19. par cogitato, quod in lege Hebræa [f]de falso teste proditum, et in lege Romana de eo qui hominis occidendi causa cum telo ambulavit. Cui consequens est ut perfectis criminibus major respondeat pœna, sed quia morte nihil est gravius, eaque iterari non potest, ut Philo notat dicto loco, ideo intra eam Pag. 789 E.

c *Apud Indos*] Apud Indorum alios furtum morte punitum notavit Nicolaus Damascenus.

d *Philo*] Secundo *de Legibus Specialibus*, (pag. 789. *et seqq.*)

e *Non consummata, et ideo consummatis minora*] Plinius de leone: *Vulneratus observatione mira percussorem novit, et in quantalibet multitudine appetit. Eum vero qui telum quidem mise-*

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2 Among the Indians, as Strabo notes, he who had maimed any one, besides retaliation, had his hand cut off. In Aristotle's *Magna Moralia, If any one strike out the eye of another, it is just that he suffer not so much only, but more.* For it is not just that the danger of the guilty and of the innocent should be the same, as Philo shews, in treating of the punishment of homicide. And this may be estimated also by considering that some delicts not consummated, and therefore less than if they were consummated, bring down, as punishment, an evil equal to that meditated: as we read of the Hebrew law of false witness, and the Roman law against him who went about with a weapon to kill a man. From which it follows, that to the crime when consummated, a heavier punishment will correspond: but because nothing is heavier than death, and that cannot be reiterated, as Philo notes, the punishment is necessarily confined within those limits, sometimes adding tortures according to the desert.

XXXIII. But the magnitude of the punishment is to be regarded, not nakedly only, but with respect to the patient. For the fine which will press down a poor man will sit lightly on a rich one: and to a

necessario consistitur, additis tamen interdum pro merito cruciatibus.

XXXIII. Pœnæ autem magnitudo non tantum nude spectatur, sed cum respectu ad patientem. Nam mulcta eadem pauperem onerabit, divitem non onerabit: et vili ignominia leve erit malum, honorato grave: quo genere diversitatis sæpe utitur lex Romana: unde harmonicam proportionem exstruxit Bodinus, cum tamen revera simplex hic sit et qualis in numeris *Lib. vi. de Rep. c. ult.* æqualitas, meriti ad pœnam, sicut in contractibus mercis ad nummos, quanquam alibi merx eadem plus, alibi minus valet, itemque nummi. At fatendum, sæpe in lege Romana id non fieri ἄνευ προσωποληψίας, id est sine nimio personarum et qualitatum ad factum non pertinentium respectu, a quo vitio longissime semper abest lex Mosis. Et hæc quidem, ut diximus, intrinseca est pœnæ taxatio.

XXXIV. Sed intra concessum modum ad minimum ducit caritas ejus qui punitur, nisi plurium justior caritas aliud suadeat ob causam extrinsecam, quæ interdum est ingens periculum ab eo qui deliquit, plerumque autem necessitas exempli.

rit, sed tamen non vulneraverit, correptum raptatumque sternit, nec vulnerat. (*Hist. Nat.* VIII. 16.)

[f] *De falso teste proditum*] Et de eo qui uxorem stupri insimulavit, ut dotem lucraretur. Deut. xxii. 19. Et de eo qui ceteroqui ex causa injusta aliquem in judicium deduxerit, alienum sibi vindicans. Exod. xxii. 9.

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disreputable person, ignominy as a punishment will be a small evil, but a great one to a man in honour. The Roman law often uses this kind of diversity; whence Bodin constructed his harmonic proportion: although in reality the proportion is simple, and resembles numerical equality: the punishment is to be equal to the desert, as, in contracts, the money to the goods: although the same goods are in one place worth more, in another less, and money in like manner. But it must be confessed that this, in the Roman law, is often not done without too much respect of persons and qualities not pertaining to the fact; while the law of Moses is always quite free from this fault. And this, as we have said, is the intrinsic apportionment of punishment.

XXXIV. But a tenderness for him who is punished, leads us to the minimum of punishment, except a juster tenderness for the greater number persuade us to some other course for an extrinsic cause; which cause is, sometimes, great danger from him who has offended, but more frequently, the necessity of example. And this necessity usually arises from the general incitements to sin, which cannot be repressed without sharp remedies. The principal incitements are custom and facility.

Ea autem nasci solet ex generalibus invitamentis ad peccandum, quæ reprimi nisi acribus remediis nequeunt. Invitamenta autem præcipua sunt, consuetudo et facilitas.

XXXV. Ob facilitatem lex divina Hebræis data gravius punit furtum [g] de pascuo quam de domo, Exod. xxii. 1 et 7, 9.
Lib. ii. 2. Justinus de Scythis: *nullum scelus apud eos furto gravius, quippe sine tecto munimentoque pecora et armenta habentibus quid salvum esset, si furari liceret?* Simile illud in Aristotelis problematis sectione XXIX. *ὁ νομοθέτης οὐχ ἱκανοὺς ὄντας ἡγησάμενος εἶναι φύλακας, τὸν νόμον αὐτοῖς ἐπέστησεν· legis auctor cum sciret [h] illis in locis dominos res suas custodire non posse, custodem legem addidit.* Consuetudo facti etsi aliquid detrahit de culpa (*non sine ratione veniam*
Lib. iv. Ep. 9. *dedit*, inquit Plinius, *facto vetito quidem, non tamen inusitato*) pœnæ tamen acrimoniam ex aliqua parte flagitat: quoniam ut
Lib. xvi. § 10. D. de Pœn. Saturninus loquitur, *nimium multis grassantibus opus exemplo est.* Sed in judiciis magis illud, in legibus hoc sequendum est, ratione habita temporis quo leges aut judicia feruntur: quia pœnæ utilitas magis in universalitate spectatur circa quam sunt leges: culpa autem major aut minor est in singulis.

[g] *De pascuo quam de domo*] Vide Maimonidem *Directore* III. 41. Cicero pro Sexto Roscio Amerino: *atque ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur.* (Cap. 40.)

[h] *Illis in locis*] In balneis: morte plectebantur Athenis fures balnearii, si æstimatio esset major decem drachmis. Demosthenes *contra Timocratem.* Adde l. 1. D. *de furibus balneariis.* [Lex Solonis exstat pag. 476 c. Orationis Demosthenicæ: sed in illa agitur tantum de iis qui furabantur in Gymnasiis aut Portubus. Diximus plura in Notis Gallicis. *J. B.*]

[i] *Supplicia meritis minora*] Justin. II. Hunnis scribens, *Ῥωμαίοις ἔνεστι μὴ ἀντιτιθέναι τὰς τιμωρίας ἰσοῤῥόπους τοῖς πλημμελήμασι· Romanis mos hic est, non irrogare pœnas pares peccantium merito.* [In *Eclogis Legationum*, ex Menandro Protectore, pag. 131. *Ed. Hœschel.* ubi Justinus non *scribit Hunnis*, sed præsens loquitur Legatis Bajani Regis Avarum. *J. B.*]

[5] Nullibi exstat talis sententia in

XXXV. On account of the *facility*, the divine law given to the Hebrews punishes more heavily theft from the field than from the house; Exod. xxii. 1 and 7. So Justin says the Scythians account theft a most heinous crime, in consequence of its facility among their uninclosed herds. So Aristotle.

The *custom* of an act, though it subtracts something from the fault (so Pliny), yet on one side it demands severity, to meet the prevailing evil. But in particular judgments, we must more lean to leniency, in making laws, to severity; taking account of the time when the laws or the judgments are delivered, because the utility of the punishment

XXXVI. 1 Quod autem diximus, ubi magnæ urgentesque causæ cessant, ad minuendam potius pœnam promptos nos esse debere, in eo clementiæ pars altera sita est. Nam priorem in tollenda pœna collocavimus. *Quia difficile est temperamentum*, inquit Seneca, *quidquid æquo plus futurum est in partem humaniorem præponderet.* Alibi: *pœnam si tuto poterit, donet, sin minus, temperet.* Et apud Diodorum Siculum laudatur rex Ægyptius, quod imponeret τιμωρίας ἐλάττους τῆς ἀξίας, [i] *supplicia meritis minora.* De M. Antonino Capitolinus: *erat mos iste Antonino, ut omnia crimina minore supplicio, quam legibus plecti solerent, puniret.* Isæus [5] quoque orator dixit, oportere leges quidem constitui rigidas, sed [k] pœnas exigi legibus mitiores. Et Isocratis est monitum: τὰς τιμωρίας ἐλάττους ποιεῖσθαι τῶν ἁμαρτανομένων· *ut pœnæ infligantur infra peccati modum.*

Lib. i. de Cl. c. 2. Ibid. c. 20. Bibl. i. 70. Cap. 24. Ad Nic. p. 19 D.

2 [l] Augustinus comitem Marcellinum sic admonet sui officii: *mihi sollicitudo maxima incussa est, ne forte sublimitas tua censeat eos tanta legum severitate esse plectendos, ut qualia fecerunt, talia patiantur, ideoque his literis obtestor*

Orationibus Isæi, quæ circa controversias civiles omnes versantur. Aut valde fallor, aut habet hoc Auctor noster e Notis FRIDERICI LINDENBROGII, qui ad Ammianum, XXVIII. 1. simul cum locis Capitolini et Isocratis heic laudatis, tamquam ex Isæo addit verba sequentia: Χρὴ τοὺς νόμους μὲν τίθεσθαι σφοδρῶς, πραοτέρως δὲ κολάζειν, ἢ ὡς ἐκεῖνοι κελεύουσι. Post primam Editionem locum reperi apud STOBÆUM, Serm. XLIV. seu *de Regno*, pag. 327. *J. B.*

[k] *Pœnas exigi legibus mitiores*] Hoc sibi volebat Henricus Imperator symbolo mali Punici, cum dicto: *Subacre.* Rex Theodoricus apud Cassiodorum XI. 40. *Qui periculose justi sumus, sub securitate semper ignoscimus.*

[l] *Augustinus*] Epistola CLIX. quæ citatur c. circumcelliones, I. causa XXIII. quæst. V. Vide, si placet, ad Augustinum eundem epistolam Macedonii, et eam qua respondet Augustinus numeris LIII. et LIV. Adde de Theodosio juniore quæ sunt in excerptis Johannis Antiocheni ex manuscripto Peirescii, (pag. 850.) Macedonius ad Augustinum: *officium sacerdotis est, intervenire pro reis.*

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is most considered in the general case; but the fault is greater or less in individual cases.

XXXVI. 1 What we have said, that when great and urgent causes cease, we should be prompt rather to diminish the punishment, is the direction in which the other part of clemency is seated: the former part consisting in taking away the punishment altogether. So Seneca speaks of *tempering* punishment when we cannot pardon; so Diodorus Siculus, Capitolinus, describing M. Antoninus, Isocrates, speak of punishment below the requirement of the laws.

2 Augustine admonishes Count Marcellinus of his duty, urging clemency.

fidem tuam, quam habes in Christo, per ipsius Domini nostri misericordiam, ut hoc non facias, nec omnino fieri permittas. Cujus est et hoc: *Sic etiam ipsos criminum ultores, atque in hoc officio non ira propria concitatos, sed legum ministros, nec suarum sed alienarum examinatarum injuriarum vindices, quales judices esse debent, terruit divina censura, ut cogitarent propter sua peccata misericordiam Dei necessariam, nec putarent ad culpam officii sui pertinere, siquid erga eos misericorditer agerent, quorum vitæ necisque haberent legitimam potestatem.*

XXXVII. Speramus nihil a nobis prætermissum, quod ad hujus argumenti satis difficilis et obscuri cognitionem magnopere faciat: nam quatuor illa quæ [m]Maimonides maxime ait spectari in pœnis, magnitudinem peccati, id est damni, frequentiam talium peccatorum, quantitatem concupiscentiæ, et operis facilitatem, ad sua loca retulimus; nec minus illa septem quæ confuse satis in pœnis considerat Saturninus. Nam persona ejus qui fecit ad aptitudinem illam judicandi maxime pertinet, et persona ejus qui patitur interdum aliquid confert ad æstimandam culpæ magnitudinem. [n]Locus injustitiæ culpam aliquam addere solet peculiarem, aut etiam ad facilitatem operis pertinere. Tempus ut diuturnum est aut breve, ita li-

L. Aut fact. 16. § 1. D. de Pœn.

[m] *Maimonides*] Lib. III. *Directoris*, c. 41. Confer c. sicut dignum, 6. *de homicidio voluntario vel casuali.*

[n] *Locus injustitiæ culpam aliquam addere solet peculiarem*] Philo Lib. I. *de Legibus Specialibus*: οὐ γὰρ ταυτὸν πατρὶ καὶ ἀλλοτρίῳ πληγὰς ἐμφορῆσαι, οὐδ' ἄρχοντ' ἢ ἰδιώτην κακῶς εἰπεῖν, οὐδ' ἐργάζεσθαί τι τῶν μὴ ἐφιεμένων ἐν βεβήλοις ἢ ἱεροῖς χωρίοις, οὐδ' ἐν ἑορταῖς καὶ πανηγύρεσι καὶ δημοτελέσι θυσίαις· *non idem est patri et extraneo inferre violentas manus: nec idem magistratui et privato maledicere: nec illicitum aliquid patrare in loco profano et sacro, in die festo, in conventu,*

XXXVII. We hope we have omitted nothing important in this obscure and difficult argument. We have taken account of the four things which Maimonides says are chiefly to be regarded in punishments; the greatness of the sin, its frequency, the amount of desire, the facility of the deed; and also the seven points which Saturninus very confusedly considers in punishments; the person who did the deed, the person who suffers, the place, the time, the quality, the quantity, the event;—all the seven belong to one or other of our heads.

XXXVIII. That wars are undertaken not unfrequently to demand punishment, we have shewn above, and history everywhere teaches: but mostly this cause is conjoined with that other, the reparation of the

bertatem judicandi auget aut minuit, interdum et pravitatem animi ostendit. Qualitas partim ad genera appetituum refertur, partim ad causas quæ abstrahere a peccando debebant. Quantitas quoque ad appetitum referenda est. Eventus ad causas abstrahentes.

XXXVIII. Solere pœnæ expetendæ causa bella suscipi, et supra ostendimus et passim docent historiæ: ac plerumque hæc causa altera de damno reparando conjuncta est, quando idem actus et vitiosus fuit et damnum reipsa intulit, ex quibus duabus qualitatibus duæ diversæ nascuntur obligationes. Non esse autem bella suscipienda ob delicta quævis satis constat: nam ne leges quidem suam illam ultionem, quæ tuto nec nisi nocentibus nocet, omnibus culpis impendunt. Recte, ut modo diximus, Sopater oportere ait, ea quæ minora et vulgaria sunt delicta dissimulari, non vindicari.

XXXIX. 1 Illud autem quod in oratione pro Rhodiensibus a Catone dictum fuit, non esse æquum pœnas quemquam dare ob eam rem quod arguatur male facere voluisse, suo quidem loco non male erat positum, quia nullum populi Rhodiensis decretum adferri poterat, sed animi fluctuantis conjecturæ: universaliter autem hoc recipiendum non est. Nam voluntas quæ ad externos actus processit (internos enim ab Gell. vii. 3.

in sacris publicis. (Pag. 805 E.) Cum his convenit quod ex Labeone adfert Ulpianus l. prætor edixit, 7. in fine D. de injuriis. *Persona atrocior injuria fit, ut cum magistratui, cum parenti, patrono fiat; tempore, si ludis et in conspectu: nam populi Romani in conspectu an in solitudine injuria facta sit, multum interesse ait.* [In hac Lege laudanda Auctor tacite sequitur emendationem rectam (quidquid dicat perpetuus obtrectator Gul. Fornerius, *Select.* I. 21. et post eum alii præjudiciis obcæcati) Summi CUJACII, qui pro *Prætoris in conspectu*, legendum censuit, *Populi Romani in conspectu*, erroremque ex siglis ortum demonstravit. *J. B.*]

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damage, when the same act was both vicious and produced damage: from which two qualities two different obligations arise. That wars are not to be undertaken for every fault, is obvious enough; for even the laws do not apply their vindictive operation to all faults, though they only harm the guilty. This is right, as we have said. So Sopater.

XXXIX. 1 What Cato said for the Rhodians, that it was not just that a person should be punished for the evil which he was alleged only to have wished to do, was not ill put in its own place, because no decree of the Rhodians [declaring war against the Romans,] could be adduced, but only conjectures of a fluctuating mind: but this is not universally to be received. For the will which has proceeded to

hominibus non puniri supra diximus) pœnis solet esse obnoxia. [o]Seneca pater in controversiis: *scelera quoque, quamvis citra exitum subsederunt, puniuntur. Injuriam qui facturus*
De Ira, i. 3. *est jam facit,* [p]ait alter Seneca. Non exitus rerum, sed
Cap. 7. [q]consilia legibus vindicari Cicero dixit pro Milone. Periandri dictum erat: *μὴ μόνον τοὺς ἁμαρτάνοντας, ἀλλὰ καὶ τοὺς μέλλοντας κόλαζε.* Sic Romani censent bellum ineundum
Liv. xlii. 30. cum rege Perseo, nisi satisfaciat de consiliis belli parandi adversus populum Romanum initis, quia scilicet arma, milites, classem jam comparaverat. Atque hoc ipsum in Rhodiensium
Lib. xlv. 24. oratione apud Livium recte notatur: neque moribus, neque legibus ullius civitatis ita comparatum esse, ut siquis vellet inimicum perire, si nihil fecerit quo id fiat, capitis damnetur.

2 Sed nec omnis perversa voluntas, facto jam aliquo indicata, pœnæ facit locum. Nam si ne perpetrata quidem peccata omnia vindicantur, multo minus cogitata ac cœpta. In
De Offic. i. 11. multis locum habet quod Cicero dicit: *haud scio an satis sit eum qui lacesserit injuriæ suæ pœnitere.* Lex Hebræis data

[o] *Seneca pater*] Excerptorum IV. 7.

[p] *Ait alter Seneca*] Et *de Beneficiis* libro v. c. 14. *Latro est etiam antequam manus inquinet: quia ad occidendum jam armatus est, et habet spoliandi atque interficiendi voluntatem.* Philo in primo [immo *secundo* libro pag. 790 C.] *de Specialibus Legibus: ἀνδροφόνους χρὴ νομίζειν οὐ τοὺς κτείνοντας αὐτὸ μόνον, ἀλλὰ καὶ τοὺς πάντα δρῶντας εἰς τὸ ἀνελεῖν, ἢ φανερῶς, ἢ λάθρα, κἂν μὴ τὸ ἀδίκημα ὦσιν εἰργασμένοι· homicidas existimari oportet non eos solum qui vitam adimunt, sed et eos qui omnia faci-*

external acts, is commonly obnoxious to punishment. So Seneca, senior and junior. Not the event of things, but the intent, are treated by the laws, says Cicero. So Periander. So the Romans decreed the second war against king Philip, except he gave satisfaction concerning the designs he had entertained of making war against Rome; inasmuch as he had collected arms, soldiers, and a fleet. And this is noted in the oration of the Rhodians in Livy; that neither is it established by the laws nor by the customs of any nation, that if any one wished his enemy to perish, but did nothing to bring such a result to pass, he should be capitally condemned.

2 But again, it is not every perverse will, which comes to be indicated by a fact, that gives occasion for punishment. For if we do not punish all perpetrated crimes, much less shall we punish those only thought of and conceived. In several places we may say what Cicero says; *I do not know whether it is not enough that the person who has done wrong should repent.* The Hebrew law did not provide specially against most offenses against piety merely preconceived, or even against the life of man (except by means of judicial proceedings);

adversum pleraque delicta inchoata contra pietatem, aut etiam contra hominis vitam extra [6]judicium, nihil speciale constituit: quia et circa res divinas utpote nobis inconspicuas facilis est error, et iracundiæ impetus non indignus est cui ignoscatur.

3 Ceterum in tanta matrimoniorum copia alienas nuptias attentare, aut in tam æquabili possessionum divisione fraudem struere qua cum aliena jactura se quis locupletet, minime erat ferendum. Nam illud, non concupisces, quod in Decalogo est, quanquam si scopum spectes legis, id est, τὸ πνευματικὸν, latius patet, ([r]vellet enim lex, omnes etiam mente esse purissimos) tamen ipsum præceptum externum, ἐντολὴν σαρκικὴν, quod attinet, ad motus animi pertinet qui facto produntur, quod aperte liquet ex Marco Evangelista qui idem illud præceptum extulit, μὴ ἀποστερήσῃς· idque cum jam ante posuisset, μὴ κλέψῃς· atque eo sensu vox Hebræa et ei respondens Græca reperiuntur tum Mich. ii. 2, tum alibi. Cap. x. 19.

4 Inchoata ergo delicta armis vindicanda non sunt, nisi et res sit gravis, et eo processum sit ut ex tali actu certum

unt palam aut clam ut quenquam interimant, etiamsi facinus ipsum nondum commiserint.

[q] *Consilia legibus vindicari*] Valerius Maximus de Cn. Sergio Silo damnato ob nummos matrifamiliæ promissos: *non factum tunc sed animus in quæstionem deductus est, plusque voluisse peccare nocuit, quam non peccasse profuit.* (Lib. VI. cap. i. num. 8.)

[6] Vide supra, § 32. hujus Capitis, num. 2. *J. B.*

[r] *Vellet enim lex, omnes etiam mente esse quam purissimos*] Chrysostomus ad Rom. iii. 13. et ad caput vii. multa habet in hanc rem.

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since error about divine things, which are obscure to us, is easily committed, and the impulse of anger may be pardoned.

3 But in matrimony, where so many matches are to be had, to attempt to disturb the married life of another; or in property, when the division is so equal, to contrive devices by which one may enrich himself at the expense of another, was not to be borne. That command, *Thou shalt not covet,* in the Decalogue, although if you look at the object of the law, that is, the spiritual object, it is of wide extent; for the law desires all to be pure even in mind; yet as to the external precept, the carnal commandment, it refers to the affections of the mind which are disclosed by deeds; as appears by St Mark, who gives that same precept, *Defraud not;* having before given, *Do not steal* (Mark x. 19). And the Hebrew word and the Greek one corresponding are found in that sense in Micah ii. 2, *And they covet fields, &c.* And elsewhere.

4 Therefore inchoate delicts are not to be punished by arms, except either the matter be grave and have gone so far that, from such act, a certain evil, though not that which was intended, has ensued; or at

malum, etsi nondum illud quod intendebatur, secutum jam sit, aut certe ingens periculum, ita ut vindicatio aut conjuncta sit cum cautione futuræ noxæ, (de qua supra egimus in capite de defensione) aut dignitatem læsam tueatur, aut pernicioso exemplo occurrat.

XL. 1 Sciendum quoque est, reges, et qui par regibus jus obtinent, jus habere pœnas poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quæ ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter violant. Nam libertas humanæ societati per pœnas consulendi, quæ initio, ut diximus, penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates resedit, non proprie qua aliis imperant, sed qua nemini parent. Nam subjectio aliis id jus abstulit. Imo tanto honestius est alienas injurias quam suas vindicare, quanto in suis magis metuendum est ne quis doloris sui sensu aut modum excedat, aut certe animum inficiat.

2 Et hoc nomine ab antiquis prædicatus est Hercules quod Antæo, Busiride, Diomede, et similibus [s] tyrannis liberarit terras, quas, ut Seneca de eo loquitur, transiit non concupiscendo, sed vindicando, maximorum bonorum auctor ho-

De Benef. i. 13.
Isoc. *Hel. Enc.* pp. 212, 213.

[s] *Tyrannis liberarit terras*] Et maria. Philo *de Legatione:* Ἡρακλῆς ἐκάθηρε γῆν καὶ θάλατταν, ἄθλους ἀναγκαιοτάτους καὶ ὠφελιμωτάτους ἅπασιν ἀνθρώποις ὑποστὰς, ἕνεκα τοῦ τὰ βλαβερὰ καὶ κακωτικὰ φύσεως ἑκατέρας ἀνελεῖν· *Hercules purgavit terras ac maria, certamina subiens hominibus omnibus partim necessaria partim perutilia, ut tolleret hominum animantiumque aliorum ea quæ exitialia aut noxia essent.* (Pag. 1003 D.)

[t] *Ultor ut scelerum vocer*] Ibidem dicenti Feciali (vers. 574):

Ἡ πᾶσιν οὖν σ᾽ ἔφυσεν ἐξαρκεῖν πατήρ;
Ten' ergo sevit omnibus genitor parem?

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least, great danger; so that the punishment be conjoined with protection against future mischief, or be a defense of offended dignity, or a remedy to a pernicious example.

XL. 1 It is to be understood also that kings, and they whose rights are of the nature of royal rights, have the right of requiring punishment, not only for injuries committed against them and their subjects, but for those also which do not peculiarly touch them, but which enormously violate the law of nature and nations in any persons. For the liberty of providing for human society by punishment, which at first, as we have said, was in the hands of individuals, did, when states and tribunals were instituted, fall to the share of the supreme authorities, not properly as commanding others, but as being themselves subject to none. For subjection took away the right

minibus, ut Lysias indicat, injustos puniendo. Diodorus Siculus de eo sic loquitur: τοὺς παρανομοῦντας ἀνθρώπους ἢ δυνάστας ὑπερηφάνους ἀποκτείνας, τὰς πόλεις ἐποίησεν εὐδαίμονας· *homines injustos et reges insolentes tollendo beatas reddebat civitates.* Alibi dixit: ἐπῆλθε τὴν οἰκουμένην κολάζων τοὺς ἀδίκους· *orbem obiit pœnas de iniquis expetens.* Dio Prusæensis de eodem: τοὺς πονηροὺς ἀνθρώπους ἐκόλαζε, καὶ τῶν ὑπερηφάνων ἀνθρώπων κατέλυε καὶ ἀφῄρειτο τὴν ἐξουσίαν· *homines malos puniebat, et superborum regna destruebat, aut in alios transferebat.* Aristides in Panathenaico ait eum suscepta communi humani generis cura meruisse in Deos referri. Laudatur similiter Theseus quod latrones Scirona, Sinin, et Procusten sustulerit, quem sic de se loquentem *Supplicibus* inducit Euripides (vers. 340, 341):

Orat. Fun. seu xxxi. 5. Bibl. iv. 17. v. 76. Orat. i. De Reg. p. 17 d. Tom. i. pp. 187, 188.

> Pridem facinora nomen hoc per Græciam
> Mihi dederunt, [t]ultor ut scelerum vocer.

Valerius Maximus de eodem: *quicquid ubique monstri aut sceleris fuit, virtute animi ac robore dextræ comminuit.* Lib. v. 3. n. 3. ext.

3 Sic non dubitamus quin justa sint bella in eos qui in parentes impii sunt, quales Sogdiani antequam eos Alexander hanc feritatem dedoceret: in eos qui [7]hospites occidunt: in Plut de Fort. Alex. p. 328 c. Tom. ii.

Respondet Theseus:

> Ὅσοι γ' ὑβρισταί· χρηστὰ δ' οὐ κολάζομεν.
> Injuriosis. Nam bonos non tangimus.

Plutarchus in ejus vita: ἀπήλλαττε τὴν Ἑλλάδα δεινῶν τυράννων· *pessimis tyrannis Græciam liberavit.* Item: οὐδὲν αὐτὸς ἀδικούμενος ὥρμησεν ὑπὲρ ἄλλων ἐπὶ τοὺς πονηρούς· *nihil ipse passus injuriæ, pro aliis in homines malos impetum sumebat,* (pag. 37 c.)

[7] Exemplum istud, quod in prima Editione legitur, in aliis omnibus exciderat. Neque enim ulla fuit ratio Auctori ejiciendi: et in animo habuerat, quod de veteribus Scythis refertur a Strabone, *Geogr.* Lib. vii. p. 300. O-

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from others. Indeed it is more honourable to punish the injuries of others than your own, in proportion as, in your own, it is to be feared lest a person may, by the sense of his own pain, either exceed due measure, or vitiate his mind with malice.

2 And on this account Hercules is praised by the ancients for having freed the land from Antæus, Busiris, Diomedes, and similar tyrants; having, as Seneca says, passed through the land not in concupiscence, but in just indignation, and thus being the author of great good to man. So Lysias, Diodorus, Dio Prusæensis, Aristides. Theseus is praised in like manner for removing the robbers Sciron, Sinis, and Procustes. See Euripides, Valerius Maximus.

3 Thus we do not doubt that war is just against those who are impious against their parents; such as the Sogdians were, before Alexander

eos [u]qui humanam carnem epulantur, [x]a quo more absistere Gallos veteres Hercules coëgit, narrante [8]Diodoro; in eos qui

De Benef. vii. 19. piraticam exercent. Seneca: *si non patriam meum impugnat, sed suæ gravis est, et sepositus a mea gente suam exagitat, abscidit nihilominus illum tanta pravitas animi.*

Lib. v. De Civ. Dei, c. 1. Augustinus: *opinantur scelera facienda decerni, qualia si aliqua terrena civitas decerneret, decrevissetve, genere humano decernente fuerat evertenda.* De talibus enim barbaris, et feris magis quam hominibus, dici recte potest quod de Persis, qui Græcis nihilo deteriores erant, perverse dixit Aristoteles, naturale in eos esse bellum; et quod Isocrates Panathenaico dixit, justissimum esse bellum in belluas, proximum in homines [9]belluis similes.

VIDIO, IV. *Trist.* Eleg. IV. vers. 63, 64. LACTANTIO, *Inst. Div.* Lib. I. cap. 21. *J. B.*

[u] *Qui humanam carnem epulantur*] Hoc quoque Scythas Alexander dedocuit. [Vid. Plutarch. ibid.]

[x] *A quo more absistere Gallos veteres Hercules coegit*] Vide Dionysium Halicarnassensem narrantem ut Hercules hunc morem aliaque multa abstulerit, in beneficiis suis Græcos a barbaris non distinguens. Romanorum non minora in genus humanum merita prædicat Plinius XXX. 1. *Non satis æstimari potest quantum Romanis debeatur, qui sustulere monstra, in quibus hominem occidere religiosissimum erat, mandi vero etiam saluberrimum.* Conjunge quæ hoc ipso capite dicentur § 47. Sic Justinianus principibus Abasgorum edixit ne subditorum pueros castrarent. Procopius meminit *Gotthicorum* IV. (seu *Hist. Misc.* cap. 3) et Zonaras *Leone Isauro.* Et Inchæ, in Peruana reges, [de quibus videndus Garcilass. de la Vega] vicinos populos, qui moniti non parerent, vi coegere absistere ab incestis, a marium cum maribus concubitu, a comestione hominum, aliisque id genus facinoribus, atque eo modo imperium sibi pararunt omnium quæ usquam legimus, excerpta religione, justissimum. [DIONYSIUS HALICARNASSENSIS narrat equidem, Herculem veteribus Italiæ incolis *persuasisse*, ut, loco victimarum humanarum, effigies quasdam hominum

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cured them of this barbarity; against those who kill strangers; against those who feed on human flesh, which usage Hercules compelled the Gauls to give up, as Diodorus narrates: and against those who practise piracy. Seneca says, that *though he does not do any harm to my country, yet such depravity cuts him off* [*from the tie of humanity*]: Augustine says that *there are things which if any state on earth have decreed, or should decree, that state would require to be overthrown by a decree of the human race.* Of such barbarians, and wild beasts, rather than men, we may say what Aristides previously said of the Persians, (who were really no worse than the Greeks,) that war against them is natural; and what Isocrates said, that war against brute beasts was most just, and next to that, war against men who are like brutes.

4 And so far we follow the opinion of Innocentius, and of others

4 Et eatenus sententiam sequimur Innocentii, et aliorum qui bello aiunt peti posse eos [y]qui in naturam delinquunt: contra quam sentiunt Victoria, Vasquius, Azorius, Molina, alii, qui ad justitiam belli requirere videntur, ut qui suscipit aut læsus sit in se aut republica sua, aut ut in eum qui bello impetitur jurisdictionem habeat. Ponunt enim illi puniendi potestatem esse effectum proprium jurisdictionis civilis, cum nos eam sentiamus venire etiam ex jure naturali, qua de re aliquid diximus libri primi initio. Et sane si illorum a quibus dissentimus admittatur sententia, jam hostis in hostem puniendi jus non habebit, etiam post juste [1]susceptum bellum ex causa non punitiva: quod tamen jus plerique concedunt et usus omnium gentium confirmat, non tantum postquam debellatum est, sed

Innoc. c. *quod sup.his: de vot. Arch. Flor.* 3. part. tit. 22. c. 5. § 8. Sylv. *in Verb. Pap.* q. 7. *Rel.* 1. *de Ind.* n. 40. *Contr. Il.* i. 24.

Saturno offerrent: verum ibidem docet, morem illum inhumanum et ferinum manere adhuc sua ætate apud Gallos, et alios Populos Occidentis. *Antiq. Rom.* Lib. I. cap. 38. Vide et JULIUM CÆSAREM, *Comment. De Bell. Gall.* Lib. VI. cap. 16. CICERONEM, *Orat. pro Fonteio*, cap. 10. *J. B.*]

[8] Voluit dicere Auctor, Dionysio Halicarnassensi. In quo tamen eum eximio Historico perperam testimonium denuntiare, patet ex iis, quæ Nota ipsius Auctoris subjecimus. *J. B.*

[9] Immo *in Barbaros*, quos pro *natura hostibus* habebant *Græci.* Inspice locum p. 267 B. *Ed. II. Steph.* *J. B.*

[y] *Qui in naturam delinquunt*] Vide Josephum Acostam *de Procuranda Indorum Salute* Lib. II. cap. 4.

[1] Non potui a me impetrare, quin adderem heic vocem illam *juste*, quæ, quamquam in omnibus Edd. desit, omnino excidisse mihi videtur, non minus quam τὸ *injuste* vidimus supra, cap. 12. § 10. Postulat additamentum particula *etiam:* ex recepta enim hactenus lectione sequeretur, secundum dissidentes, bellum suscipi posse et *ex caussa punitiva*, et *ex caussa non punitiva;* quod falsum. Deinde major esset dubitandi ratio, an post bellum susceptum ex caussa non punitiva hostis in hostem puniendi jus habeat, quam post bellum susceptum ex caussa punitiva: cujus tamen contrarium supponit illud *etiam*, ut quivis videt. Debuisset tunc dici *saltem*,

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who say that war may be made against those who sin against nature; contrary to the tenets of Victoria, Vasquius, Azorius, Molina, and others; who seem to require, in order to justify a war, that he who undertakes it should be either injured in his own person, or in the country to which he belongs, or that he should have jurisdiction over him whom he attacks. For they hold that the power of punishing is the proper effect of Civil Jurisdiction; while we conceive that it comes also from Natural Law. If the opinion of those from whom we dissent be admitted, an enemy will not have the power of punishing an enemy, even after war has been justly begun, if it be for another cause than to inflict punishment: which right, however, most authors concede, and the usage of all nations confirms, not only after the war has been finished, but even while it is going on; and this right is claimed, not from any civil juris-

et manente bello; non ex ulla jurisdictione civili, sed ex illo jure naturali quod et ante institutas civitates fuit, et nunc etiam viget, quibus in locis homines vivunt in familias non in civitates distributi.

XLI. Sed cautiones hic nonnullæ adhibendæ sunt; prima ne mores civiles, quamvis inter multos populos non sine ratione recepti, sumantur pro jure naturæ: qualia ferme erant illa quæ Persas a Græcis disparabant, ad quæ recte

Vit. Pomp. p. 656 D. Plutarchi illud referas: *πρόφασιν πλεονεξίας ἡμερῶσαι τὸ βαρβαρικόν· barbaras gentes ad mores cultiores reducere velle obtentum esse quo veletur alieni cupiditas.*

XLII. Secunda, ne temere annumeremus a natura vetitis ea de quibus id non satis constat, et quæ lege potius divinæ voluntatis interdicta sunt, in qua classe forte ponere liceat [z]innuptos concubitus, et quosdam eorum qui incesti dicuntur, et fœnus.

XLIII. 1 Tertia, ut diligenter distinguamus inter prin-

non *etiam.* Adde, ut fecimus, *juste,* omnia plana sunt: si enim bellum injuste susceptum fuerit, tunc injustitia illa caussæ minus mirum efficit, quod jus puniendi desit. *J. B.*

[z] *Innuptos concubitus*] Asterius Amaseæ episcopus: *οἱ τοῖς τοῦ βίου τούτου νομοθέταις προσέχοντες ἀνεύθυνον καταλείπουσι τῆς πορνείας τὴν ἐξουσίαν· qui hujus tantum sæculi leges condentibus obtemperant, impunitam relinquunt meretricii licentiam.* Adde locum Hieronymi ad Oceanum, productum a nobis ad caput v. § 9.

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diction, but from that natural right which existed before states existed, and is still in force in places in which men live, distributed into families and not into states.

XLI. But here some cautions are to be applied; first, we are not to take instituted usages of states, though received among many nations, and not without reason, for the laws of nature; of which kind mostly were those things in which the Persians differed from the Grecians; to which we may refer what Plutarch says: *that to profess to civilize barbarous nations, was a pretext to cover mere cupidity.*

XLII. In the second place, we must take care that we do not rashly reckon, among the things forbidden by nature, those, with regard to which this is not clear; and which are rather interdicted by the divine will: in which class we must place concubinage, and some of the offenses called incest, and usury.

XLIII. 1 In the third place, we must carefully distinguish between general principles,—such as that we must live virtuously, that is, according to reason, and some which approach to them and are so

cipia generalia, quale est honeste vivendum, id est, secundum rationem, et quædam his proxima, sed ita manifesta ut dubitationem non admittant, quale est alteri suum non rapiendum, et inter illationes quarum aliæ facilem habent cognitionem, ut posito matrimonio [a]non admittendum adulterium, aliæ vero difficiliorem, ut ultionem quæ in dolore alterius acquiescit esse vitiosam. Ferme idem hic evenit quod in mathematicis, ubi quædam sunt notitiæ primæ, aut primis proximæ, quædam demonstrationes quæ statim et intelliguntur et assensum obtinent, quædam veræ quidem sed non omnibus patentes.

L. 38. § 4. D. ad l. Jul. de Adult.

2 Sicut ergo circa leges civiles eos excusamus qui legum notitiam aut intellectum non habuerunt, ita et [b]circa naturæ leges par est eos excusari quibus aut ratiocinationis imbecillitas aut prava educatio obstant. Nam ignorantia legis sicut, inevitabilis si sit, tollit peccatum; ita etiam cum aliqua negligentia conjuncta delictum minuit. Atque ideo Aristoteles barbaros, qui prave educati circa talia delinquunt, iis com-

Matt. x. 15. Luc. xii. 47, 48.

Nic. vii. 6.

[a] *Non admittendum adulterium*] Adulteria ubique puniri testatur Philo vita Josephi, (pag. 533 B.) adulterium natura turpe esse Ulpianus l. Probrum 42. D. *de Verborum Significatione.* Lactantius in Epitome: *corrumpere alienum matrimonium etiam communi gentium jure damnatur.* (Cap. 5.)

[b] *Circa naturæ leges par est eos excusari quibus aut ratiocinationis imbecillitas aut prava educatio obstant*] Hieronymus II. adversus Jovinianum: *unaquæque gens hoc legem naturæ putat quod didicit.* (Tom. II. pag. 75. *Edit. Basil.*)

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manifest that they admit of no doubt, as, for instance, that we are not to take by violence what belongs to another;—and inferences from these; of which some are easy to know, for instance, that assuming matrimony, we are not to allow adultery; but others not so easy, as that the revenge which has for its ultimate object the pain of others is vicious. We have here nearly the same case as in mathematics, where there are certain primary notions, or truths immediately connected with these, [axioms], and some demonstrations which are forthwith understood and obtain assent; and again, certain propositions which are true but not apparent to all.

2 As then, with regard to civil laws, we excuse those who did not know, or did not understand the law; so also with regard to the law of nature, it is reasonable to excuse those who are embarrassed, either by weakness of reason or by a bad education. For ignorance of the law, as, when it is invincible, it takes away the sin, so too, even when mixed with some negligence, it diminishes the offense. And therefore Aristotle compares barbarians who, being educated in a depraved manner, commit offenses in such cases, to those who have appetites

parat qui morbo corruptos habent appetitus. Plutarchus ait esse quædam *νοσήματα καὶ πάθη τῆς ψυχῆς τὰ κατὰ φύσιν ἐξιστάντα τὸν ἄνθρωπον· morbos animi qui hominem de naturali statu dejiciant.*

3 Postremo illud addendum, quod semel dico ne sæpe repetam, quæ ad pœnam exigendam suscipiuntur bella suspecta esse injustitiæ, nisi scelera sint atrocissima et manifestissima, aut alia simul aliqua causa concurrat. De Romanis Mithridates forte non extra verum aiebat: *non delicta regum illos sed vires ac majestatem insequi.*

Just. xxxviii. 6.

XLIV. 1 Perduxit nos ordo ad delicta quæ in Deum committuntur: quæritur enim an ad ea vindicanda bellum suscipi possit, quod late satis tractat Covarruvias. Sed ille alios secutus existimat punitivam potestatem non esse sine proprie dicta jurisdictione: quam sententiam nos jam ante rejecimus. Unde sequitur, sicut in rebus ecclesiæ dicuntur episcopi aliquo modo τὴν καθολικὴν πεπιστεῦσθαι· id est, [c] *universalis ecclesiæ curam accepisse*, ita et regibus, præter peculiarem suæ civitatis, etiam generalem pro humana societate curam incumbere. Potior ratio pro sententia negante justa esse bella talia, hæc est, quod Deus sufficiat vindicandis

Ad C. Pecc. Part. 2. § 10.

c *Universalis ecclesiæ curam accepisse*] Est id in *constitutionibus* præferentibus nomen Clementis. (Lib. VI. cap. 14.) Cyprianus epist. XXX. *Omnes enim nos decet pro corpore totius ecclesiæ, cujus per varias quasque provincias membra digesta sunt, excubare.* (Ep. 36. secundum divisionem Fell.) Et de unitate ecclesiæ: *episcopatus unus est, cujus a singulis in solidum pars te-*

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corrupted by disease. Plutarch says: *There are certain diseases which throw the mind out of its usual balance.*

3 In the last place, that also is to be added, which I say once for all, that wars undertaken on the ground of punishment, must be very suspected, except the crimes are very atrocious and very manifest; or except some other cause concur. Perhaps Mithridates was not very wrong when he said of the Romans, that *they did not really attack the vices of kings, but their power and majesty.*

XLIV. 1 Our order has led us to the offenses which are committed against God. For it is made a question whether war may be undertaken to punish these; and this is treated at sufficient length by Covarruvias. But he, following others, thinks that there is no punitive power without jurisdiction properly so called; which opinion we have already rejected. Whence it follows, that as bishops are said, in a certain way, to have received the care of the catholic or universal Church, so kings, besides the care of their particular state, have in-

quæ in se committuntur, unde dici solet, *Deorum injurias diis curæ*, et *perjurium satis Deum habere ultorem.* L. 2. C. de reb. cred.

2 Verum sciendum est idem et de aliis delictis dici posse. Nam illis quoque puniendis Deus haud dubie sufficit, et tamen ea ab hominibus recte puniuntur, nemine dissentiente. Instabunt quidam et dicent, alia delicta ab hominibus puniri, quatenus homines alii inde læduntur aut periclitantur. Sed notandum contra, non tantum ab hominibus puniri delicta quæ directe alios lædant, sed et quæ per consequentiam, qualis sui occisio, concubitus cum bestiis, et alia quædam.

3 Religio autem quanquam per se ad conciliandam Dei gratiam valet, habet tamen et suos in societate humana effectus maximos. Neque enim immerito Plato religionem propugnaculum potestatis ac legum et honestæ disciplinæ vinculum vocat. Plutarchus similiter *συνεκτικὸν ἁπάσης κοινωνίας καὶ νομοθεσίας ἔρεισμα, coagulum omnis societatis et fundamentum legislationis.* Cont. Colot. p. 1125 E. Philoni quoque est *φίλτρον ἀνυσιμώτατον καὶ δεσμὸς ἄλυτος εὐνοίας ἐρωτικῆς ἡ τοῦ ἑνὸς Θεοῦ τιμή· efficacissimum amatorium, et vinculum indissolubile benevolæ amicitiæ,* [d]*unius Dei cultus.* De Monarch. p. 818 B. Contraria omnia ab impietate:

netur. (Pag. 108. *Ed. Fell. Brem.*) Exempla hujus curæ universalis passim apud Cyprianum: illustre imprimis epistola LXVII. (LXVIII. divis. Fell.) Addo Chrysostomum in laudibus S. Eustathii.

[d] *Unius Dei cultus*] Idem *de Fortitudine: αἴτιον τῆς ὁμονοίας τὸ ἀνώτατον καὶ μέγιστον ἡ περὶ τοῦ ἑνὸς Θεοῦ δόξα, ἀφ' ἧς οἷα πηγῆς ἑνωτικῇ καὶ ἀδιαλύτῳ φιλίᾳ κέχρηνται πρὸς ἀλλή-*

cumbent upon them a general care for human society. The sounder reason for the doctrine that such wars are not just, is this, that God is sufficient to punish offenses against himself; whence it is commonly said, that *wrongs against the gods are the business of the gods,* and that, *perjury has a sufficient avenger in God.*

2 But it is to be recollected that this may be said of other offenses also. For God is no doubt sufficient to punish these also; and yet they are rightly punished by men, no one dissenting. Some pursue the argument, and say, that other offenses are punished by men, so far as men are by them hurt or injured. But it is to be noted, on the other hand, that offenses are punished which not only hurt others directly, but those also which do so by consequence, as self-murder, and bestiality, and others.

3 For though religion of itself is efficacious in conciliating the favour of God, yet it has in human society its especial effects, and those very important ones. For Plato, with great reason, called

Sil. Ital. iv. 794. Heu primæ scelerum causæ mortalibus ægris,
[c] Naturam nescire Dei.

De Superst. p. 164 E. Omnis falsa, inquit Plutarchus, de rebus divinis persuasio perniciosa, accedente animi perturbatione perniciosissima. Ex-Protrep. c. 3. stat apud Jamblichum sententia Pythagorica: ἡ γνῶσις τῶν θεῶν ἀρετή τε ἐστὶ καὶ σοφία καὶ εὐδαιμονία τελεία· *Dei cognitio et virtus est, et sapientia, et perfecta felicitas.* L. 2. D. de Legg. Hinc Chrysippus legem dixit reginam divinarum humanarumvii. Polit. c. 8. que rerum, et Aristoteli [f] inter curas publicas prima de rebus L. 10. § 2. D. De Just. et Jur. divinis, et Romanis jurisprudentia divinarum humanarumque De Creat. Magist. p. 723 B. rerum notitia. Philoni ars regia πραγμάτων ἰδιωτικῶν καὶ δημοσίων καὶ ἱερῶν ἐπιμέλεια· *rerum privatarum, publicarum, et sacrarum curatio.*

4 Hæc vero omnia non tantum in una aliqua civitate Cyr. Instit. viii. 1. consideranda sunt, ut cum apud Xenophontem Cyrus ait subditos hoc sibi addictiores fore, quo Dei essent metuentiores, sed et in communi societate generis humani. *Pietate* Lib. i. de Nat. Deor. 2. *sublata,* inquit Cicero, *fides etiam et societas humani gene-*

λους· *summa ac maxima concordiæ causa, de uno Deo sensus, ex quo velut fonte procedit insolubilis et animos inter se vinciens amicitia,* (pag. 741 D. E.) Josephus autem contra Appionem libro II. τὸ γὰρ μίαν μὲν ἔχειν καὶ τὴν αὐτὴν δόξαν περὶ Θεοῦ, τῷ βίῳ δὲ καὶ τοῖς ἔθεσι μηδὲν ἀλλήλων διαφέρειν, καλλίστην ἐν ἤθεσιν ἀνθρώπων συμφωνίαν ἐπιτελεῖ· *eandem de Deo habere sententiam, nihilque vita et institutis inter se discrepare, pulcherrimam in animis hominum concordiam excitat.* (Pag. 484. § 19. *Edit. Huds.* Tom. II.)

[e] *Naturam nescire Dei*] Sic et Josephus adversus Appionem libro altero causas cur multæ civitates male constitutæ fuerint, has reddit: τὸ μήτε τὴν ἀληθῆ τοῦ Θεοῦ φύσιν ἐξ ἀρχῆς συνιδεῖν αὐτῶν τοὺς νομοθέτας, μηθ' ὅσον

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religion the bulwark of virtue, and the bond of the laws and of honest discipline; and Plutarch similarly, the cement of society, and the foundation of laws. So Philo calls it the most potent love-charm, and indissoluble bond of benevolence. And the reverse of all this is said of impiety. All false persuasion concerning divine things is pernicious, and if passions are combined with it, is most pernicious. In Jamblichus we have a dictum of Pythagoras: *The knowledge of God is virtue and wisdom and perfect happiness.* Hence Chrysippus called Law the Queen of divine and human things, and Aristotle held, that among public cares, the first was that of divine things; and the Roman jurisprudence was described as the knowledge of things human and divine: and in Philo, the royal art is the *care of things private, public and sacred.*

4 All these things are to be considered, not only in one state, as when Xenophon makes Cyrus say, that his subjects would be more

ris, et una excellentissima virtus justitia tollitur. Idem alibi: *justitiam affert, cum cognitum habeas quod sit summi rectoris et domini numen, quod consilium, quæ voluntas.* Atque hujus rei evidens argumentum est, quod Epicurus, cum divinam providentiam sustulisset, [g]justitiæ quoque nihil reliquit nisi nomen inane, ut quam nasci diceret ex sola conventione, neque durare ulterius quam communis duraret utilitas, abstinendum autem ab his quæ alteri nocitura essent solo pœnæ metu. Verba ipsius ad hanc rem sane insignia exstant apud Diogenem Laërtium.

De Fin. iv. 5.

Lib. x. §§ 150, 151.

5 Vidit hunc nexum et Aristoteles, qui v. *de Repub.* cap. XI. sic ait de rege: *ἧττον φοβοῦνται τὸ παθεῖν τι παράνομον ὑπὸ τῶν τοιούτων, ἐὰν δεισιδαίμονα νομίζωσιν εἶναι τὸν ἄρχοντα· minus enim populus timebit injuste tractari a principe quem religiosum credat.* Et Galenus libro IX. de placitis Hippocratis et Platonis, cum multa de mundo divinaque natura quæri dixisset, nullo ad mores usu, quæstionem de providentia agnoscit usus esse maximi tum ad privatas

καὶ λαβεῖν ἠδυνήθησαν, ἀκριβῆ γνῶσιν διορίσαντας, πρὸς τοῦτο ποιήσασθαι τὴν ἄλλην τάξιν τοῦ πολιτεύματος. Vide et quæ sequuntur ibidem optime, (pag. 491. § 35.)

[f] *Inter curas publicas prima de rebus divinis*] Ad quarum cognitionem Imperatores vocans Justinus Martyr addit: *βασιλικὸν ἂν καὶ τοῦτο ἔργον εἴη· erit hoc opus sane regium.* (*Apolog.* II. cap. viii. pag. 23. *Edit. Oxon.* 1703.) Adde quæ habet Covarruvias in c. peccatum, Part. II. § 10.

[g] *Justitiæ quoque nihil reliquit nisi nomen inane*] Seneca epist. XCVII. *Illic dissentiamus cum Epicuro, ubi dicit nihil justum esse natura, et crimina vitanda esse, quia vitari metus non possit.*

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attached to him in proportion as they feared God more; but also, in the common society of the human race. *If we take away piety*, says Cicero, *good faith and the fellow-feeling of mankind and justice are taken away.* And again: *We learn what justice is when we know the authority of the supreme Governor and Lord, what is his design, what his will.* And an evident proof of this is, that Epicurus, when he had taken away divine providence, left nothing but the empty name of justice, saying that it arose from convention only, and lasts so long only as the common utility continues; that we must abstain from every thing which would turn others, solely from the fear of punishment. See his words in Diogenes Laertius.

5 Aristotle also saw this connexion, as where he says of a king, that *the people will the less fear to be unjustly treated by the prince, if they believe him to be religious.* And Galen says that many discussions are carried on, about the world and the divine nature, without any moral use; but he acknowledges the question concerning providence to be of

tum ad publicas virtutes. Vidit et hoc Homerus, qui Odysseæ
Ver. 120, et seqq. sexto et octavo hominibus *ὑβρισταῖς καὶ ἀγρίοις*, *feris et*
Ver. 576. *injustis*, opponit eos quibus *νόος ἐστὶ θεουδής*, *mens religiosa.* Sic Judæorum veterum [h]justitiam religione permixtam
Lib. xxxvi. 2. laudat ex Trogo Justinus; sicut eosdem Judæos Strabo *δι-*
Geograph. xvi. p. 761. *καιοπραγοῦντας καὶ εὐσεβεῖς ὡς ἀληθῶς ὄντας.* Lactantius:
Inst. Div. v. 14. *si ergo pietas est cognoscere Deum, cujus cognitionis hæc summa est ut eum colas, ignorat utique justitiam, qui religionem Dei non tenet. Quomodo enim potest eam nosse qui*
De Ira Dei, c. 7. *unde oriatur ignorat?* Idem alibi: *religioni est propria justitia.*

6 Jam vero majorem etiam usum habet religio in majori illa quam in civili societate, quia in civili partem ejus supplent leges et facilis legum exsecutio: cum contra in magna illa communitate juris exsecutio sit difficillima, ut quæ nisi armis expleri nequeat, et leges paucissimæ: quæ ipsæ insuper sanctimoniam suam habent præcipue a metu numinis; unde qui in jus gentium peccant, divinum jus violare passim dicuntur. Non male ergo religionem contaminatam ad omnium pertinere
L. 4. C. de Hæreticis. injuriam dixere Imperatores.

XLV. 1 Ut rem totam penitius introspiciamus, notandum est, religionem veram, quæ omnium ætatum communis

[h] *Justitiam religione permixtam*] Philo *Vita Abrahami*: *τῆς αὐτῆς φύσεώς ἐστιν εὐσεβῆ τε εἶναι καὶ φιλάνθρωπον, καὶ περὶ τὸν αὐτὸν ἑκάτερον ὁσιότης μὲν πρὸς θεὸν, δικαιοσύνη δὲ πρὸς ἄνθρωπον θεωρεῖται· ejusdem est naturæ religiosum esse et hominum amantem: apud eundem spectantur pietas in Deum, et in homines justitia,* (pag. 378 D.)

[i] *Antisthenes*] Laudatus Clementi Alexandrino. [Cap. VI. pag. 66. *Ed. Oxon.* ubi tria priora verba desunt.] Ex illo videtur hoc promsisse Seneca Lib. VII. c. 30. naturalium quæstionum: *ipse qui ea tractat, qui condidit, qui totum*

the greatest use, both in its bearing upon private and upon public virtues. So Homer opposes, to wild and unjust men, those who have a religious mind. So Justin praises, in the ancient Jews, their justice mixed with religion: and so Strabo. So Lactantius says that he who is not religious does not know what justice is.

6 And religion is even more useful in that larger society [of the human race] than in civil society; since in the latter, its place is supplied by laws, and the easy execution of laws; while on the contrary, in that wider community, the execution of law is very difficult, since it can only be carried into effect by arms, and the laws are very few. And these too have their sanction mainly from the fear of the divine power: and hence, they who transgress the Laws of Nations, are every-

est, quatuor præcipue pronuntiatis niti; quorum primum est, Deum esse, et esse unum: secundum, Deum nihil esse eorum quæ videntur, sed his aliquid sublimius: tertium, a Deo curari res humanas, et æquissimis arbitriis dijudicari: quartum, eundem Deum opificem esse rerum omnium extra se. Hæc quatuor totidem decalogi præceptis explicantur.

2 Nam primo aperte traditur Dei unitas: secundo natura ejus inconspicua: nam propter eam imago ejus exstrui vetatur Deut. iv. 12. Quomodo et [i]Antisthenes dicebat: *ὀφθαλμοῖς οὐχ ὁρᾶται, οὐδενὶ ἔοικεν, διόπερ αὐτὸν οὐδεὶς ἐκμαθεῖν ἐξ εἰκόνος δύναται· oculis non conspicitur, rei nulli est similis, unde nec quisquam eum potest ex effigie cognoscere.* [k]Philo autem; *τὸν ἀόρατον εἰκονογραφεῖν ἢ διαπλάσσειν οὐχ ὅσιον· profanum est ejus qui inconspicuus est pingendo aut fingendo imaginem exhibere.* Diodorus Siculus de Mose: *Excerpt. e Lib. xl.* *ἄγαλμα οὐ κατεσκεύασε διὰ τὸ μὴ νομίζειν ἀνθρωπόμορφον εἶναι τὸν Θεόν· [l]simulacrum non constituit, eo quod Deum non crederet humana forma esse.* Tacitus: *Judæi* *Hist. v. 5.* *mente sola unumque numen intelligunt: profanos qui Deum imagines mortalibus materiis in speciem hominum effingunt.* Plutarchus vero cur [m]Numa de templis simulachra sustulerit causam hanc reddit: *ὡς οὐκ ἐφάπτεσθαι Θεοῦ* *p. 65 B. Vit. Num.*

hoc fundavit, deditque circa se, majorque est pars operis sui ac melior, effugit oculos, cogitatione visendus est.

k *Philo autem*] Dicit hæc apud Philonem rex Agrippa, (pag. 1032.)

l *Simulacrum non constituit*] Dion libro XXXVI. (pag. 41 E. *Ed. II. Steph.*) *οὐδ' ἄγαλμα οὐδὲν ἐν αὐτοῖς ποτὲ τοῖς Ἱεροσολύμοις ἔσχον· ἄῤῥητον δὲ καὶ ἀειδῆ αὐτὸν νομίζοντες εἶναι,* &c.: *nec ullum Hierosolymis simulacrum habebant, quod Deum crederent neque conspici, neque verbis explicari posse.* Vide et Strabonem libro XVI. (pag. 761.)

m *Numa*] De hoc Numæ instituto vide et Dionysium Halicarnassensem.

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where said to violate the divine laws. And hence the Emperors have rightly said that the infraction of religion is a wrong against all.

XLV. 1 To examine the whole matter, we must remark that true religion, common to all ages, rests mainly on four principles; of which the first is, that God exists, and is one: the second, that God is not any visible object, but something higher: the third, that God cares for human affairs, and judges them with perfect justice: the fourth, that God is the creator of all other things. These four points are delivered in the first four commandments of the Decalogue.

2 For in the first, the unity of God is plainly delivered: in the second, his nature, as invisible; for on this account it is forbidden to make any image of him. So Antisthenes; Philo; Diodorus, speaking

δυνατὸν ἄλλως ἢ νοήσει· quod Deus concipi nisi sola mente non possit. Tertio præcepto intelligitur cognitio et cura rerum humanarum, etiam cogitationum: nam id jurisjurandi fundamentum est. Deus enim testis etiam cordis, et si quis fallat vindex invocatur; quo ipso simul et justitia Dei significatur et potentia. Quarto, origo mundi totius auctore Deo, [n]in cujus rei memoriam institutum fuit olim sabbatum, et quidem singulari quadam sanctimonia supra ritus alios. Nam si quis in alios ritus peccasset, pœna legis erat arbitraria, ut de cibis vetitis; si in hunc, pœna capitis: quia sabbati violatio ex instituto continebat abnegationem mundi a Deo creati. Mundus autem a Deo creatus et bonitatem ejus et sapientiam et æternitatem et potentiam tacite indicat.

3 Ex his autem notionibus contemplativis sequuntur ac-

[Nihil habet hac de re eximius ille Antiquitatum Romanarum Scriptor. Debet Auctor noster Cyrillo, *contra Julian.* Lib. vi. p. 193. *Edit. Spanhem.* sed qui videtur ex errore Dionysium Halicarnassensem pro alio laudasse: nam putat Numam e *Philosophia Pythagorica* hoc institutum hausisse; quum Dionysius Halicarnassensis, Lib. ii. cap. 59. ostendat, Pythagoram quatuor ætatibus post Numam vixisse, adeoque hunc illius discipulum esse non potuisse. *J. B.*]

[n] *In cujus rei memoriam institutum fuit olim sabbatum*] Scriptor responsorum ad orthodoxos, ad quæstionem lxix. *ἵνα οὖν φυλαχθῇ ἡ μνήμη τῆς τοῦ κόσμου ποιήσεως ἐν τοῖς ἀνθρώποις, διὰ τοῦτο τιμιώτερον τῶν ἄλλων εὑρίσκειν ἔταξε τὸν ἑπτὰ ἀριθμὸν ἐν τῇ θείᾳ γραφῇ· ut ergo memoria mundi conditi inter homines servaretur, ideo voluit Deus septenarium numerum in sacris literis eminere ceteris honoratiorem.* Vide et quæ præcedunt. (Inter Opera Justini Martyr. pag. 336. *Ed. Sylburg.*)

[o] *Quæ consensio*] Tertullianus *adversus Marcionem: animæ a primordio conscientia Dei dos est.* (Lib. i. c. 10.) *φυσικὴ εὐλάβεια, pietas naturalis,* Diodoro Siculo in fragmentis, (e Lib. xxiii.

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concerning Moses; Tacitus, of the Jews; Plutarch, of Numa.

By the third commandment is indicated God's knowledge and care of human things, even of human thoughts; for that is the foundation of oaths. For God is a witness even of the heart; and if any one swear falsely, He is invoked as the punisher: and by this is declared both the justice and the power of God.

By the fourth, the origin of the whole world in the act of God, in memory of which the sabbath was instituted, and hallowed with a peculiar sanction above other rites. For if any one transgressed other rites, the penalty of the law was arbitrary, as concerning forbidden meats: but for the violation of the sabbath, it was death; because the violation of the sabbath implied the denial of the creation of the world by God. And the world, as created by God, contains a tacit indication of his goodness, wisdom, eternity, and power.

3 From these contemplative notions follow active precepts; as that

tivæ, ut Deum honorandum, amandum, colendum, eique obtemperandum. Itaque Aristoteles eum qui Deum honorandum aut parentes amandos neget, non argumentis sed pœna edomandum dixit. Et alibi alia quædam esse honesta, Deum honore prosequi ubique. Istarum autem quas contemplativas diximus notionum veritas haud dubie etiam petitis ex rerum natura argumentis demonstrari potest, inter quæ illud validissimum est, quod res aliquas esse factas ostendat sensus, res autem factæ omnino nos ad aliquid non factum deducant. Sed quia hanc rationem et similes alias non omnes capiunt, sufficit quod ab omni ævo per omnes terras, paucissimis exceptis, in has notiones consenserunt, et hi qui crassiores erant quam ut vellent fallere, et alii sapientiores quam ut fallerentur: [o]quæ consensio in tanta et legum et opinionum aliarum varietate

Top. i. 11.

Ibid. ii. 11.

Eclog. ii.) Philo *de Unius Imperio*: *οὐδὲν τεχνικῶν ἔργων αὐτοματίζεται. τεχνικώτατος δὲ ὁ κόσμος, ὡς ὑπό τινος τὴν ἐπιστήμην ἀγαθοῦ καὶ τελειοτάτου πάντων δεδημιουργῆσθαι· τοῦτον τὸν τρόπον ἔννοιαν ἐλάβομεν ὑπάρξεως Θεοῦ· nihil artem præferens casu oritur. Maximam autem artem mundus præfert, testaturque a summe perito summeque perfecto se fabricatum. Notitia, qua Deum esse credimus, hinc ortum habet.* (Pag. 815 E.) Tertullianus *adversus Marcionem* I. (cap. 18.) *Nos defendimus Deum primum natura cognoscendum, deinde doctrina recognoscendum: natura ex operibus: doctrina ex prædicationibus.* Cyprianus *de Idolorum Vanitate*, (cap. v. num. 9. *Ed. Cellar.*) *hæc est summa delicti, nolle agnoscere quem ignorare non possis.* Julianus *ad Heraclium*: *πάντες ἀδιδάκτως εἶναι θεῖόν τι πεπείσμεθα, καὶ πρὸς τοῦτον ἀφορᾶν ἐπ' αὐτό τε οἶμαι σπεύδειν· οὕτω διατιθέμενοι τὰς ψυχὰς πρὸς αὐτὸ, ὥσπερ εἶναι πρὸς τὸ φῶς τὰ βλέποντα· omnes ante doctrinam numen aliquod esse persuasi sumus, eo respiciendum, ad eum properandum: credoque sic animos nostros se habere ad Deum, ut visu prædita ad Lucem.* (Orat. VII. p. 209 C. *Ed. Spanhem.*)

God is to be honoured, loved, worshipped, and obeyed. Hence Aristotle says that he who denies that God is to be honoured, or parents to be loved, is to be brought to reason, not by arguments, but by punishment. And elsewhere he says that other things are reckoned right in one place or another, but to honour God, in all places.

The truth of those contemplative notions, as we have called them, may doubtless be demonstrated by arguments taken from the nature of things; among which arguments, that is the strongest; that our senses shew us that some things are made; and that the things which are made lead us to something not made. But because all cannot take in this reason and similar ones, it is sufficient that all ages, and all countries, with very few exceptions, have given their consent to these notions: and those, some too dull to intend to deceive, and others too wise to be deceived. And this consent, in so

satis ostendit traditionem a primis hominibus ad nos propagatam, ac nunquam solide refutatam, quod vel solum ad fidem faciendam satis est.

4 Conjunxit ea quæ memorata nobis jam sunt de Deo *Orat. xii. p. 205.* Dion Prusæensis, cum dixit ὑπόληψιν, id est, persuasionem de Deo, aliam esse nobis cognatam, ex argumentis scilicet petitam, aliam ἐπίκτητον acquisitam ex traditione. Plutarchus *In Amator. p. 756 B.* eandem vocat παλαιὰν πίστιν, ἧς οὐκ ἔστιν εἰπεῖν οὐδ' ἀνευρεῖν τεκμήριον ἐναργέστερον, ἕδραν καὶ βάσιν ὑφεστῶσαν κοινὴν πρὸς εὐσέβειαν· *antiquam persuasionem, qua nullum haberi possit aut dici argumentum certius, fundamentum in commune pietati positum.* Aristoteles: *De Cœlo, i. 3.* πάντες ἄνθρωποι περὶ θεῶν ἔχουσιν ὑπόληψιν. Idem sensus apud Platonem *de Legibus* decimo. *p. 887 D, E. Tom. II.*

XLVI. 1 Quare non vacant culpa qui, etiamsi hebetioris sint ingenii quam ut certa ad illas notiones argumenta aut reperire possint, aut comprehendere, eas repudiant, cum et ad honestum sint duces, et diversa sententia nullis argumentis nitatur. Sed quia de pœnis et quidem humanis agimus, discrimen hic adhibendum est inter notiones ipsas, et inter modum ab iis discedendi. Hæ notiones, numen aliquod esse (unum an plura sepono) et curari ab eo res hominum, maxime sunt universales, et ad religionem, sive veram, sive falsam, constituendam omnino necessariæ: *Heb. xi. 6.* τὸν προσερχόμενον τῷ Θεῷ, (id est, *qui religionem habeat*: nam religio Hebræis accessus ad Deum vocatur) πιστεῦσαι δεῖ ὅτι ἐστὶ, καὶ τοῖς ἐκζητοῦσιν αὐτὸν μισθαποδότης γίνεται· *eum credere oportet et esse Deum, et ab eo præmia dari se colentibus.*

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great a variety of other laws and other opinions, shews sufficiently a tradition propagated from the first race of men to us, and never solidly refuted; which of itself is sufficient to produce belief.

4 The points which we here mention concerning God are brought together by Dio Prusæensis, when he says that our conception of God is partly internal, partly acquired by tradition. So Plutarch speaks of *the ancient faith, than which no more evident proof can be found, the common foundation and basis of piety.* So Aristotle and Plato.

XLVI. 1 Wherefore they are not blameless who, although they are too dull either to discover or to understand the solid arguments for these points of belief, reject them; since there exist, for them, guides to the right way, and the opposite opinion has no

2 Similiter Cicero: *Sunt philosophi, et fuerunt, qui nullam habere censerent humanarum rerum procurationem Deos, quorum si vera sententia est, quæ potest esse pietas, quæ sanctitas, quæ religio? hæc enim omnia pure ac caste tribuenda Deorum ita numini sunt, si animadvertuntur ab his, et si est aliquid a Diis immortalibus humano generi tributum.* Epictetus: τῆς περὶ τοὺς θεοὺς εὐσεβείας ἴσθι ὅτι τὸ κυριώτατον ἐκεῖνό ἐστιν, ὀρθὰς ὑπολήψεις περὶ αὐτῶν ἔχειν, ὡς ὄντων καὶ διοικούντων τὰ ὅλα καλῶς καὶ δικαίως· *Pietatis hoc præcipuum, bene sentire de Diis, ut qui et sint et res omnes juste ac recte administrent.* Ælianus ait, barbarorum neminem delapsum ad ἀθεότητα, sed ab omnibus affirmari [p] et esse numen, et nostri curam gerere. Plutarchus, libro de communibus notitiis, ait eam quæ de Deo est notitiam tolli, sublata providentia: οὐ γὰρ ἀθάνατον καὶ μακάριον μόνον, ἀλλὰ καὶ φιλάνθρωπον καὶ κηδεμονικὸν καὶ ὠφέλιμον, προλαμβάνεσθαι καὶ νοεῖσθαι τὸν θεόν· *non enim immortalem tantum et beatum, sed et hominum amantem, ita ut et curet eos et prosit ipsis, concipi atque intelligi Deum.* Lactantius: *neque honor ullus deberi potest Deo si nihil præstat colenti, nec ullus metus si non irascitur non colenti.* Et revera negare Deum esse, aut negare a Deo curari actiones humanas, si moralem effectum respicimus, tantundem valet.

De Nat. Deor. i. 2.
Enchir. c. 28.
Lib. ii. 31.
p. 1075 E.
De Ira Dei, c. 6.

3 Quare ipsa quasi necessitate auctore hæ duæ notiones

p *Et esse numen, et nostri curam gerere*] Seneca epistola xcv. *Primus est deorum cultus, deos credere: deinde, reddere illis majestatem suam, reddere bonitatem, sine qua nulla majestas est.*

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arguments to rest upon. But since we are speaking of punishments, and of human punishments, a difference is to be taken between the notions themselves, and the mode of departing from them. These notions, that there is a deity (I do not here say whether one or many), and that he cares for human affairs, are most universal, and absolutely necessary to constitute all religion, true or false. *He that cometh to God* (that is he who is to be religious) *must believe that he is, and that he is a rewarder of them that seek him.* Heb. xi. 6.

2 So Cicero; Epictetus; Elian; Plutarch; Lactantius. To deny that God exists, and to deny that he attends to human affairs, comes to the same thing, as to its moral effect.

3 Wherefore these two points of belief have been preserved, as if by necessity, among almost all nations of which we know any-

[q]apud omnes ferme quos novimus populos, per tot jam sæcula, conservatæ sunt. Hinc Pomponius erga Deum religionem juri asscribit gentium: et apud Xenophontem, Socrates τοὺς θεοὺς σέβειν, *Deos colere legem esse* ait, quæ apud omnes homines valeat: quod et Cicero tum *de Natura Deorum* libro primo, tum secundo de inventione affirmat. Dion Prusæensis oratione XII. vocat δόξαν καὶ ἐπίνοιαν κοινῇ τοῦ ξύμπαντος ἀνθρωπίνου γένους, ὁμοίως μὲν Ἑλλήνων, ὁμοίως δὲ βαρβάρων, ἀναγκαίαν καὶ ἔμφυτον ἐν παντί τῷ λογικῷ γινομένην κατὰ φύσιν· *persuasionem quæ insit hominibus communiter omnibus, non minus barbaris quam Græcis, necessariam ac naturalem cunctis ratione utentibus.* Et paulo post: πάνυ ἰσχυρὰν καὶ ἀένναον ἐκ τοῦ παντὸς χρόνου καὶ παρὰ πᾶσι τοῖς ἔθνεσιν ἀρξαμένην τε καὶ διαμένουσαν· *persuasionem valde robustam ac sempiternam apud omnes gentes et cœptam et permanentem.* Xenophon in *Convivio* et Græcos et barbaros ita ait existimare, nota esse Diis et præsentia et futura.

L. 2. D. de Just. et jure. Memorab. iv. 4. num. 19. Cap. 16. Cap. 22. p. 201. Cap. iv. § 47.

4 Has igitur notitias qui primi incipiunt tollere, sicut in bene constitutis civitatibus coërceri solent, ut Diagoræ Melio accidisse legimus, et Epicureis, qui ex bene moratis urbibus ejecti sunt, [r]ita et coërceri posse arbitror nomine humanæ

q *Apud omnes ferme quos novimus populos*] Seneca epist. CXVII. *Tanquam Deos esse inter alia sic colligimus, quod omnibus de Diis opinio insita est: nec ulla gens usquam est adeò extra leges moresque projecta, ut non aliquos deos credat.* Idem *de Beneficiis* IV. 4. *nec in hunc furorem omnes mortales consensissent alloquendi surda numina et inefficaces Deos, &c.* Adde Platonem *Protagora*, (pag. 322. Tom. I.) et decimo *de Legibus*, (pag. 887 D. E. Tom. II.)

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thing. Hence Pomponius describes religion towards God as a part of the law of nations; and Socrates in Xenophon says that to worship the gods, is a rule among all men. So Cicero; Dio Prusæensis; Xenophon in the *Symposium.*

4 Therefore those who first begin to take away these convictions, as they may, in well constituted states, be coerced by punishment, as was done to Diagoras Melius, and to the Epicureans, who were ejected from well-governed states; so may they be coerced, as I conceive, in the name of human society, which they violate without probable reason. So Himerius pleading against Epicurus: *Do you then demand that mere doctrines be punished? By no means, but that impiety should. Men may deliver doctrines; they may not oppose piety.*

XLVII. 1 Other points of religion are not so evident; as, that there are not more gods than one: that God is not any visible

societatis, quam sine ratione probabili violant. Himerius Sophista actione in Epicurum: δόγματος οὖν ἀπαιτεῖς δίκας; οὐκ, ἀλλ' ἀσεβείας· δογματίζειν μὲν γὰρ ἐξὸν, ἀσεβεῖν δὲ οὐκ ἐπιτέτραπται· *placiti igitur pœnam exigis? neutiquam, sed impietatis; placita tradere permittitur, non et pietatem oppugnare.* Apud Phot. Cod. 243. col. 1083.

XLVII. 1 Ceteræ notiones non æque sunt evidentes, ut Deos plures uno non esse: nihil eorum quæ videmus Deum esse, non mundum, non cœlum, non solem, non aërem: mundum non esse ab omni æternitate, ac ne ejus quidem materiam, sed a Deo facta. Itaque harum cognitionem temporum lapsu apud multos populos obliteratam, et quasi extinctam videmus; eoque facilius quia leges hanc partem minus curabant, ut sine qua aliqua saltem consistere religio posset.

2 Ipsa lex Dei illi populo data quem Prophetæ et prodigia partim conspecta, partim non dubitandæ auctoritatis fama ad ipsos perlata, cognitione harum rerum nec obscura nec incerta imbuerant, quanquam falsorum Deorum cultus maxime detestatur, non tamen omnes ejus culpæ convictos morte punit; sed eos demum quorum facta circumstantiam habent singularem, ut eum qui princeps alios seduxerit. Deut. xiii. 1, 6, civitatem quæ incepit colere Deos ante ignotos,

et pulchra quæ habet Jamblichus post principium de mysteriis Ægyptiorum, ubi Deum nosse ita homini ait proprium, ut hinnitum equo.

r *Ita et coerceri posse arbitror nomine humanæ societatis*] Moxus Lydus Crambi urbis inhabitatores obsidione captos mersit omnes οἷον ἀθέους, ut qui Deum nullum nossent, colerentve. Nicolaus Damascenus in excerptis Peirescianis. (Pag. 442.)

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object; not the world, not the sky, not the sun, not the air; that the world does not exist from eternity; not even matter, of which it is made, but that matter was created by God. Therefore, as to these points, the knowledge has been, among many peoples, obliterated by the lapse of time, and as it were extinct; and the more easily because the laws gave less attention to this point, as being that without which at least some religion might subsist.

2 Even the law of God, given to the Jewish people, who were imbued with a knowledge of these things, neither obscure nor uncertain, by the prophets, and by miracles, partly seen by themselves and partly delivered by clear tradition, still does not punish with death all who are convicted of this offense; but only those in whom there is some particular circumstance to aggravate the fact, or who have seduced others; as Deut. xiii. 1, 6; or the city which begins to

Deut. xiii. 12, 13, eum qui astra colit, ut legem totam, ac proinde Dei veri cultum deserat, Deut. xvii. 2, (quod Paulo

Rom. i. 25. est λατρεύειν τῇ κτίσει παρὰ τὸν κτίσαντα, [s] *opificio servire, non opifici:* nam παρὰ ibi et alibi sæpe vim habet exclusivam) quæ res etiam apud Esaui posteros aliquo tempore pœnis fuit subdita, ut videre est Jobi xxxi. 26, 27, eum quoque qui liberos Molocho, id est, Saturno dederit, Lev. xx. 2.

3 Cananæos vero et vicinos illis populos pridem delapsos ad pravas superstitiones non statim Deus puniendos judicavit, sed tum demum cum hanc culpam magnis sceleribus cumulassent, Gen. xv. 16. Sic et in aliis populis dissimulavit ignorantiæ tempora circa falsorum numinum cultus, Actor. xvii.

Leg. ad Cai. p. 1031 B. 30. Nimirum recte a Philone dictum est, religionem suam cuique videri optimam, ut quæ plerumque non ratione sed

Acad. iv. 3. affectu dijudicetur: unde non longe abit dictum Ciceronis, nemini ullam disciplinam philosophiæ probari, præter eam

[s] *Opificio servire, non opifici*] Philo *ad Decalogum de Talibus:* εἰσί δ' οἳ καὶ προσυπερβάλλουσιν ἀσεβείᾳ, μηδὲν τῶν ἴσων μεταδιδόντες, ἀλλὰ τοῖς μὲν τὰ πάντα τῶν ἐπὶ τιμῇ χαριζόμενοι, τῷ δ' οὐδὲν νέμοντες, ἀλλ' οὐδὲ μνήμης τὸ κοινότατον ἀξιοῦνται· ἐπιλήθονται γὰρ οὗ μόνον προσῆκον ἦν μεμνῆσθαι, ἐπιτηδεύοντες οἱ βαρυδαίμονες ἑκούσιον λήθην, &c. *sunt autem alii quorum ulterius impietas procedit, qui ne parta quidem Deo et operibus ejus tribuant, sed quicquid honoris excogitari potest his exhibent, illud communissimum bonum nulla memoratione dignantes, id prætereunt quod solum me-*

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worship strange gods, ver. 12, 13; or that worships the sun, or the moon, or the host of heaven, Deut. xvii. 3; (which St Paul calls serving *the creature, and not the Creator,* Rom. i. 25; and which also was at one time punished among the posterity of Esau, Job xxxi. 26, 27, [*If I beheld the sun when it shined, or the moon walking in brightness, and my heart hath been secretly enticed, or my mouth hath kissed my hand;*]) or that gave his children to Moloch, Lev. xx. 2; that is, to Saturn.

3 The Canaanites and the neighbouring peoples, who fell away to depraved superstitions, God did not straightway punish, but only at last, when they had accumulated great wickedness upon this transgression, Gen. xv. 16. [God says to Abraham, *In the fourth generation they shall come again; for the iniquity of the Amorites is not yet full.*] So in other nations also, God winked at the times of this ignorance, Acts xvii. 30. Philo says truly, that each one thinks his own religion the best, judging mostly, not by reason, but by affection; as Cicero says of philosophical doctrines. He adds, that most are involved in their religious belief, before they can use their judgment.

quam ipse sequatur. Addit, plerosque teneri adstrictos antequam quid esset optimum judicare possent.

4 Sicut autem excusabiles sunt et ab hominibus certe non puniendi, qui cum legem a Deo proditam nullam acceperint, aut astrorum, aut aliarum rerum naturalium virtutes, aut spiritus, sive in imaginibus, sive in animantibus, sive in rebus aliis colunt, aut etiam animas eorum qui virtute et beneficiis in humanum genus excelluerunt, aut mentes quasdam incorporeas, præsertim si nec ipsi tales cultus commenti fuerint, [t]nec summi Dei cultum ideo deserant; ita impiis magis quam errantibus annumerandi sunt, qui aut cacodæmonas quos tales esse norunt, aut vitiorum nomina, aut homines, quorum vita fuit flagitiis plena, divinis honoribus colere instituunt.

5 Nec minus illi qui deos colunt hominum innocentum sanguine, a quo more quod Carthaginienses abstinere coëgerit laudatur [u]Darius Persarum rex, et Gelo Syracusarum tyrannus. Narrat et Plutarchus, barbaros quosdam, qui humanis

Just. xix. 1. Plut. *Apoph.* p. 175 A. *et de sera num. vind.* p. 552 A. *Quæst. Rom.* 83.

minisse debuerant, sponte miseri sibi accersentes quæsitam oblivionem, (pag. 753 A. B. *Ed. Paris.*) Sic locum Deuteronomii interpretatur Maimonides *Directore* III. 41.

[t] *Nec summi Dei cultum ideo deserant*] Sic victimas ab Ægypti regibus, ab Augusto, a Tiberio in Templum admisere Judæi. Docent id et Josephus et Philo, [*de Legat. ad Cai.* p. 1036 C. Verum illi Reges et Principes non propterea Deum Judæorum, ut unicum et summum, adgnoscebant; eadem sacra cuivis alii Numini oblaturi. *J. B.*]

[u] *Darius*] Hystaspis filius, Xerxis pater. Confer quæ supra § 41.

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4 As, then, those are excusable, and certainly not to be punished by men, who, not having received any law delivered by God, worship the influences or spirits of the stars, or of any other natural bodies, either in images, or in animals, or in other things; or even the souls of those who have excelled in virtue, and in benefits bestowed on the human race; or some incorporeal minds; especially if they have not themselves invented this worship, and therefore have not deserted for it the worship of the supreme God; so, on the other hand, they are to be reckoned impious rather than erroneous, who appoint divine honour and worship for evil demons, whom they know to be such, or for names of vices, or for men whose life was marked by wicked deeds.

5 Nor are they less to be reckoned impious, who worship gods with the blood of innocent men; which custom Darius of Persia and Gelo of Syracuse compelled the Carthaginians to discontinue, and are therefore praised. Plutarch relates that some barbarians, who worshipped the gods with human victims, were on the point of being punished by the Romans; but, having excused themselves by the antiquity of the

victimis deos colebant, pœnas daturos Romanis fuisse: sed cum antiquitate moris se excusarent, nihil mali passos: vetitos tantum nequid in posterum tale facerent.

XLVIII. 1 Quid de illis armis dicemus quæ inferuntur populis aliquibus, eam ob causam quod illi Christianam religionem sibi propositam amplecti nolunt? Non jam quæram an talis proponatur qualis debet, et quomodo debet. Demus ita fieri: duo notanda dicimus. Prius est veritatem Christianæ religionis, quatenus scilicet naturali ac primævæ religioni non pauca superaddit, argumentis mere naturalibus persuaderi non posse, sed niti historia tum resurrectionis Christi, tum miraculorum ab ipso et Apostolis editorum: quæ res est facti, olim quidem irrefragabilibus testimoniis probata, sed olim, ita ut et hæc quæstio facti sit, et jam perantiqui. Quo magis fit, ut doctrina hæc ab his qui nunc primum eam audiunt penitus in animum admitti nequeat, nisi secretis Dei auxiliis accedentibus, quæ sicut quibus dantur non dantur in operis alicujus mercedem, ita si quibus negantur aut minus large conceduntur, id

x *Nemini deinceps ad credendum vim inferre*] Josephus ita censet *δεῖν ἕκαστον ἄνθρωπον κατὰ τὴν ἑαυτοῦ προαίρεσιν θεὸν εὐσεβεῖν, ἀλλὰ μὴ μετὰ βίας· debere quemque libero animi proposito Deum colere, non vi coactum.* (In Vit. sua, p. 11. § 23. *Edit. Huds.* Tom. II.)

y *Quarum rerum causæ nos latent eis causam assignare divinam voluntatem*] Servius ad initium III. *Æneidos,* (vers. 2.) *Quotiescunque ratio vel judicium non apparet, sic visum interponitur.* Sic et Donatus ad actum V. scena 2. *Eunuchi,* (vers. 36.) Atque in eum sensum poni Hebræum חפץ notat Abarbanel.

z *Christo novæ legis auctori omnino hoc placuisse, ut ad legem suam recipiendam nemo hujus vitæ pœnis, aut earum*

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custom, no harm was done them; but they were commanded not to do the like in future.

XLVIII. 1 What shall we say of making war on certain peoples because they will not embrace the Christian religion when offered to them? I will not now enquire whether it be proposed to them such as it ought to be, and in such manner as it ought to be. Suppose this: we have then two remarks to make. The first is, that the truth of the Christian religion, in so far as it adds not a few points to natural and primitive religion, cannot be proved by mere natural arguments, but rests both on the history of the resurrection of Christ, and on that of the miracles done by him and the apostles; which is a matter of fact, proved of old by irrefragable testimonies, but only of old; so that this also [the ancient testimony] is a matter of fact, and of very old fact. Hence this doctrine cannot be received by those who now hear it for the first time, without the assistance of secret help from God;

fit ob causas non iniquas illas quidem sed plerumque nobis incognitas, ac proinde humano judicio non punibiles. Huc respicit canon concilii Toletani: *Præcipit sancta synodus,* Cap. 5. de
[x]*nemini deinceps ad credendum vim inferre. Cui enim vult* *Judæis, dist.* 45.
Deus miseretur, et quem vult indurat. Mos enim est sacrorum librorum, [y]quarum rerum causæ nos latent, eis causam assignare divinam voluntatem.

2 Alterum hoc est, [z]Christo novæ legis auctori omnino hoc placuisse, ut ad legem suam recipiendam nemo hujus vitæ pœnis, aut earum metu pertraheretur, Rom. viii. 15; Hebr. ii. 15; Joan. vi. 67; Luc. ix. 55; Matth. xiii. 29, quo sensu verissimum illud Tertulliani: *Lex nova non se vindicat* [2]*ultore gladio.* In libro antiquo, cui nomen Constitutiones Clementis Lib. vi. 22.
de Christo, dicitur: *τὸ αὐτεξούσιον τῶν ἀνθρώπων ἀφῆκεν ἐλεύθερον, οὐ προσκαίρῳ θανάτῳ δικάζων, ἀλλ' ἐν ἑτέρᾳ καταστάσει λογοθετῶν αὐτό· liberam reliquit hominibus arbitrii potestatem, non morte temporali eos puniens, sed in altero sæculo ad reddendam rationem vocans.* [a]Athanasius:

metu pertraheretur] Tractat hoc Gregorius Nazianzenus oratione. Cum assumptus est a Patre: et Beda Lib. I. c. 26. Isidorus *de Sisebuto rege: Qui in initio regni sui Judæos ad fidem Christianam permovens, æmulationem quidem Dei habuit, sed non secundum scientiam: potestate enim compulit, quos provocare oportuit fidei ratione.* (Pag. 224. *Edit. Vulcan.*) Transcripsit hoc in historiam Rodericus 11, 13. Posteriores in Hispania reges eodem nomine culpant Osorius, et Mariana; quem vide XXVI. 13, XXVII. 5.

[2] Ita legitur locus, quem in animo habuit Auctor: *Nam vetus lex ultione gladii si vindicabat. . . . nova autem lex clementiam designabat.* Advers. Judæos, cap. 3. *J. B.*

[a] *Athanasius*] *Epistola ad Solitarios* (Tom. I. pag. 855 A.)

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and as this, when given, is not given as the reward of any work, so if it be denied, or given less largely, this is done for causes, not unjust indeed, but mostly unknown to us, and hence not punishable by human judgment. To this the canon of Toledo has respect. The Synod enjoins that henceforth no one suffer violence, to make him believe: For God will have mercy on whom he will have mercy, and whom he will he hardeneth. It is the manner of the scriptures, to ascribe to the divine will the things of which the causes are hid from us.

2 Another remark is, that it was the will of Christ, the author of the new law, that none should be urged to receive his law by the punishments of this life, or by their fear. [See the passages, Rom. viii. 15, *Ye have not received the spirit of bondage again to fear.* So Heb. ii. 15, *subject to bondage.* John vi. 67, *Will ye also go away?*

Dominus non cogens, sed libertatem suam voluntati permittens, dicebat quidem vulgo omnibus: Si quis vult venire post me: Apostolis vero: [b]nunquid et vos abire vultis?
Tom. II. p. 751. Chrysostomus ad eundem Johannis locum: *ἐρωτᾷ λέγων, μὴ καὶ ὑμεῖς θέλετε ὑπάγειν; ὅπερ πᾶσαν ἦν ἀφαιροῦντος βίαν καὶ ἀνάγκην· interrogat an et ipsi velint discedere? quod omnem est amoventis vim ac necessitatem.*

3 Nec obstat illud in fabula de nuptiis, quod quidam jubentur cogi intrare, Luc. xiv. 23, nam sicut in ipsa fabella illud cogere [c]instantiam vocatoris significat, ita et in affabulatione, quo sensu vox ejusdem significationis accipitur Luc. xxiv. 29, nec aliter Matth. xiv. 22; Marc. vi. 45; Gal. ii. 14. Procopius in arcanæ historiæ parte docet, a sapientibus culpatum fuisse [d]Justiniani consilium, quod Samaritas vi ac minis

[b] *Nunquid et vos abire vultis?*] Cyprianus epistola LV. *Conversus ad Apostolos suos dixit: nunquid et vos vultis ire? servans scilicet legem, qua homo libertati suæ relictus, et in arbitrio proprio constitutus, sibimet ipse vel mortem appetit, vel salutem.* (Epist. 59. divis. Fell.)

[c] *Instantiam vocatoris significat*] Cyprianus *De Idolorum Vanitate* hunc locum respiciens: *Per orbem vero discipuli, magistro et Deo monente, diffusi, præcepta Dei in salutem darent, ab errore tenebrarum ad viam lucis adducerent, cæcos et ignaros ad agnitionem veritatis ocularent. Ac, ne esset probatio minus solida, et de Christo delicata confessio, per tormenta, per cruces, per multa pœnarum genera tentantur.* (Cap. 7.)

[d] *Justiniani consilium*] Ad eundem Justinianum epistolam Theodahadi vide in Cassiodoro x. 26.

[e] *Ammianus*] Idem vere, Christianam religionem absolutam et simplicem vocat (Lib. XXI. c. 16) Zosimus et ipse paganus: Χριστιανῶν πίστεως ἐπαγγελία παντὸς ἁμαρτήματος καὶ πάσης ἀσεβείας ἀπαλλαγή· *Christianæ fidei*

Luke ix. 55, *Ye know not what manner of spirit ye are of.* Matt. xiii. 29, *Nay, lest while ye gather up the tares,* &c.] In this sense, that saying of Tertullian is most true, *The new law does not assert its rights with the sword.* So in the Clementine Constitutions: Athanasius. Chrysostom, on the passage, John vi. 67, says that it removes all compulsion.

3 The parable of the wedding, Luke xiv. 23, *Compel them to come in*, is not against this. For in that parable, the expression signifies the urgency of the invitation; and in like manner, in the interpretation, in which sense words of the like signification are used, Luke xxiv. 29, *They constrained him.* So Matt. xiv. 22, *Jesus constrained his disciples,* &c., and in the parallel passage, Mark vi. 45. So Gal. ii. 14, *Why compellest thou the Gentiles,* &c. Procopius says, that Justinian was blamed by wise men for compelling the Samaritans by force to become Christians: and adds the inconveniences which resulted, which you may find in his book.

XLIX. 1 They who teaching or professing Christianity, add

ad Christianam religionem compulerit: addit et incommoda inde secuta, quæ apud ipsum legas.

XLIX. 1 Qui vero Christianismum docentes aut profitentes eam ob causam pœnis subdunt, haud dubie faciunt contra ipsam rationem; nihil enim est in disciplina Christiana (ipsam hic per se considero, non quatenus ei insincerum aliquid admiscetur) quod humanæ societati noceat, imo nihil quod non prosit. Res ipsa loquitur, et extranei coguntur agnoscere. Plinius Christianos sacramento inter se obstringi ait, ne furta, ne latrocinia committant, ne fidem fallant. [e]Ammianus ea religione nihil ait doceri nisi justum et lene. Et vulgi verbum, *Bonus vir Caius Sejus, tantum quod Christianus.* Nec admittendæ excusationes, nova omnia metuenda, præsertim cœtus: nam neque metuenda sunt dogmata quamvis nova, si

Lib. xxii. 11.

Tert. *Apol.* c. 3. et 1. *advers. Nat.* c. 4.

hæc est pollicitatio, libertas ab omni crimine atque impietate. (Lib. II. c. 29. *Ed. Cell.*) Secta nemini molesta passim a paganis dicebatur. Tertullianus *Scorpiaco,* (cap. 1.) Justinus *Apologetico* II. *Ἀρωγοὶ δ' ὑμῖν καὶ σύμμαχοι πρὸς εἰρήνην ἐσμὲν πάντων μᾶλλον ἀνθρώπων, ὅτι ταῦτα δοξάζομεν, ὡς λαθεῖν θεὸν κακόεργον, ἢ πλεονέκτην ἢ ἐπίβουλον, ἢ ἐνάρετον ἀδύνατον εἶναι, καὶ ἕκαστον εἰς αἰωνίαν κόλασιν ἢ σωτηρίαν κατ' ἀξίαν τῶν πράξεων πορεύεσθαι· Nos vobis ad imperii tranquillitatem maxime adjutatores et collaboratores sumus, ut qui doceamus fieri non posse ut Deo quis lateat, sive sit maleficus, raptor, insidiator, sive æqui amans: tum vero ad æternam aut salutem aut pœnam quemque mitti pro factorum suorum dignitate.* (Pag. 44. *Edit. Sylburg.*) Arnobius de conventibus Christianorum loquens libro IV. *in quibus aliud auditur nihil nisi quod humanos faciat, nisi quod mites, verecundos, pudicos, castos, familiaris communicatores rei cum omnibus quos solidet germanitatis necessitudine copulatio.* (Pag. 152. *Edit. Lugd. B. Salm.*)

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punishments on that account, doubtless act against reason; for there is nothing in the scheme of Christianity (considered by itself, and not with impure mixtures,) which can hurt human society; indeed nothing which does not profit society. The thing itself speaks, and strangers are compelled to acknowledge it. Pliny says, that the Christians bound themselves by a common sacrament not to commit theft, robbery, or fraud. Ammianus says, that nothing is taught in that religion except justice and mercy. And it was a common saying, *Caius Sejus is a good man, only he is a Christian.* [Therefore persecution is inconsistent with Christianity*.]

Nor can we admit the excuses for persecution, that all novelties are dangerous, and especially assemblies; for doctrines, although new, are not dangerous, if they lead to all virtue, and to obedience towards

* This is the thesis which suits the argument: but some of the examples rather seem to imply that Grotius was thinking of the thesis: "Therefore those act unreasonably who persecute Christians." W.

modo ad honesta omnia atque ad exhibendam superioribus obedientiam ducant, nec suspecti esse debent cœtus proborum hominum, et qui latere non quærunt nisi cogantur. Recte huc aptem quod Augustum de Judæorum conventibus dixisse [f]Philo commemorat: non eos bacchanalia esse aut cœtus turbandæ paci, sed virtutum scholas.

2 Qui in tales sæviunt, ipsi in ea causa sunt ut puniri Thom. 2, 2. 108. juste possint, quod et Thomæ videtur. Atque eam ob causam [g]Constantinus Licinio, Imperatores [h]alii Persis bellum intulerunt: quanquam hæc bella magis ad innocentum defensionem, de qua et infra agemus, quam ad pœnæ exactionem pertinent.

L. 1 In eos vero qui Christi legem pro vera habent, [3]sed de quibusdam quæ aut extra legem sunt, aut in lege sensum videntur habere ambiguum, et ab antiquis Christianis non eundem in modum sunt exposita, dubitant aut errant, suppliciis qui grassantur, perinique faciunt: quod ostendunt et ea quæ ante diximus, et Judæorum exemplum vetus. Nam hi

[f] *Philo commemorat*] In legatione, (p. 1035 E.) Similiter et libro de sacrificantibus, facunde ostendit quantum synagogæ distent a paganicis mysteriis, (pag. 856, &c.) Locus uterque dignus inspici. Simile habet libro altero contra Appionem Josephus.

[g] *Constantinus Licinio*] Vide Zonaram. Simile illud apud Augustinum epist. L. *Maximianus episcopus Vagiensis auxilium petit ab Imperatore Christiano contra hostes ecclesiæ, non tam sui ulciscendi causa, quam tuendæ ecclesiæ sibi creditæ.* Relatum est in causam XXIII. quæst. iii. c. 2.

[h] *Alii Persis*] Vide Menandrum Protectorem.

[3] In hanc rem habemus scripta plurima sub finem sæculi proxime præteriti, et hoc ipso, quo vivimus, in lucem edita, Anglice, Latine, præsertim Gallice, et sic satis nota; in quibus, luce meridiana clarius, demonstratum est, neminem, Religionis caussa, ullo modo

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superiors: nor are assemblies of virtuous men to be feared, who do not seek to meet in secret, except they are compelled. I may here adopt what Augustus said, as recorded by Philo, respecting the assemblies of the Jews; that they were not bacchanalian meetings, or assemblies for disturbing the peace, but schools of virtue.

2 Those who persecute such, are themselves justly punishable, as also Thomas Aquinas holds. And on that account, Constantine made war on Licinius, and other emperors upon the Persians; though these wars belong rather to the defense of the innocent, of which we shall hereafter speak, than to the exaction of punishment.

L. 1 But those act most unjustly, who persecute and punish those who, while they hold the law of Christ as true, only doubt or err concerning some things which are either extraneous to the law, or being in the law, seem to have an ambiguous sense, and are not

cum legem haberent quæ suppliciis hujus vitæ sanciebatur, nunquam tamen pœnis subdiderunt Sadducæos qui rejiciebant dogma resurrectionis, verissimum quidem, sed in ea lege non nisi obscure et sub verborum aut rerum involucris traditum.

2 Quid si vero gravior sit error, et qui apud æquos judices facile possit sacra autoritate, aut veterum consensu revinci? cogitandum hic quoque quanta sit vis inolitæ opinionis, et quantum libertatem judicii minuat in suam cujusque sectam studium, malum, ut Galenus ait, quavis scabie insanabilius. Lib. i. *de nat. facult.* Apposite ad hanc rem Origenes: εὐχερέστερόν γε ἄνθρωπος τὰς περὶ ἄλλα συνηθείας, κἂν δυσαποσπάστως αὐτῶν ἔχῃ, καταλείψαι ἂν, ἢ τὰς περὶ τὰ δόγματα· *facilius quis alia sibi consueta exuat, quantumvis illis affixus sit,* [1]*quam ea quæ dogmatum sunt.* Lib. i. *contr. Cels.* p. 40. Adde quod quanta hæc sit culpa pendet ex modo illuminationis et aliis animi dispositionibus, quas hominibus pernoscere non est datum.

vexandum; et argumenta eorum, qui aliorum intellectui legem dicere volunt, et in animos dominari, ita confutata, ut dissensui nullus amplius locus futurus esset, si veritatis studium, modestia, et charitas, in animos vexantium tantillum admitti possent. Nobis quoque, post primam Notularum istarum Editionem, occasio nata est argumentum illud fuse satis more modoque nostro persequendi, in Libro Gallico *De Doctrina Morali Patrum Ecclesiæ,* cap. 12. § 9. *et seqq.* *J. B.*

[1] *Quam ea quæ dogmatum sunt*] Sequitur hoc Chrysostomus in I. Cor. ii. ὅταν δὲ καὶ ἐν δόγμασιν ἡ συνήθεια ᾖ, βεβαιοτέρα γίνεται. πάντα γάρ τις εὐκολώτερον ἀμείψειε, ἢ τὰ περὶ τὰς θρησκείας· *ubi vero consuetudo in dogmata inciderit, multo sit immobilior. Nihil enim est quod non facilius homo mutet, quam ea quæ religionis sunt.* (Tom. VI. pag. 286. *Edit. Savil.*)

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always expounded by the ancient Christians in the same way. And this appears both by what we have said, and by the ancient example of the Jews. For they, though they had a law which was sanctioned by the punishments of this life, never penally assailed the Sadducees, who rejected the doctrine of the resurrection; a doctrine most true, but not delivered in the old law, except obscurely and in images.

2 But what are we to say, if the error be more grave, and one which may easily be refuted before an impartial tribunal, by sacred authority, or the consent of the ancients? Here also we are to reflect how great is the force of inveterate opinions, and how much the party-feeling of each sect impairs their judgment; a disease, as Galen says, worse than the itch. So Origen. Add that the amount of this fault depends upon the manner in which a person is enlightened, and other dispositions of the mind, which it is not given to man to know.

3 [k] Hæreticus Augustino is demum qui alicujus [l] temporalis commodi et maxime gloriæ principatusque sui gratia, falsas ac novas opiniones vel gignit vel sequitur. Audiamus de Arianis Salvianum: *hæretici sunt, sed non scientes: denique apud nos sunt hæretici, apud se non sunt: nam in tantum se Catholicos esse judicant, ut nos ipsos titulo hæreticæ pravitatis infament. Quod ergo illi nobis sunt, et hoc nos illis. Nos illos injuriam divinæ generationi facere certi sumus: quod minorem Patre Filium dicant. Illi nos injuriosos Patri existimant, quod æquales esse credamus. Veritas apud nos est, sed illi apud se esse præsumunt. Honos Dei apud nos est, sed illi hoc arbitrantur honorem divinitatis quod credunt. Inofficiosi sunt, sed illis hoc est summum religionis officium. Impii sunt, sed hoc putant veram esse pietatem. Errant ergo, sed* [m] *bono animo errant, non odio sed affectu Dei, honorare se dominum atque amare credentes. Quamvis non habeant rectam fidem, illi tamen hoc perfectam Dei æstimant caritatem; et qualiter pro hoc ipso falsæ opinionis errore in die judicii puniendi sint,* [n] *nemo potest scire nisi judex. Interim idcirco eis, ut reor, patien-*

De Gubernat. Dei, v. 2. p. 100.

[k] *Hæreticus Augustino*] Libro *de Utilitate Credendi* (cap. 1) locus refertur in causam XXIV. quæstione 3. c. 28. Addit Augustinus, non idem sibi videri hæreticum et hæreticis credentem hominem. Vide eundem epistola CLXII. Hæresis *obstinatioris animi dementia:* l. 2. c. *de summa Trinitate,* princ. [At illius pertinaciæ solus Deus Judex est, ut ab Auctoribus, de quibus modo dixi, indicatum. *J. B.*]

[l] *Temporalis commodi et maxime gloriæ principatusque sui gratia*] Scriptor *responsorum ad orthodoxos* quæstione IV. (pag. 308. inter Opp. Justin. Martyr. *Ed. Sylburg.*) δῆλοί εἰσιν ὅτι ἐκ φιλοδοξίας ἢ ἀντιπαθείας τῶν αἱρεσιαρχῶν πᾶσαι αἱ αἱρέσεις τὰς ἀφορμὰς ἐσχήκασι τῆς συστάσεως αὐτῶν· *apertum est ex cupiditate gloriæ aut ex æmulatu qui primos repertores agitaverit, sectas omnes exsistendi originem cepisse.* Chrysostomus ad Gal. v. ἡ γὰρ τῶν αἱρέσεων μήτηρ, ἡ τῆς φιλαρχίας ἐστὶν ἐπιθυμία· *mater hæresium, cupiditas principatus.* (In vers. 13. pag. 754. Tom. III.)

[m] *Bono animo errant*] Agathias ubi de Alemannorum absurdis superstitionibus egerat historiarum I. ἐλεεῖσθαι μὲν οὖν ἢ χαλεπαίνεσθαι δίκαιοι ἂν εἶεν καὶ πλείστης μεταλαγχάνειν συγγνώμης, ἅπαντες ὅσοι δὴ τοῦ ἀληθοῦς ἁμαρτάνουσιν. οὐ γὰρ δήπου ἑκόντες ἁλῶνται καὶ ὀλισθαίνουσιν, ἀλλὰ τοῦ ἀγαθοῦ ἐφιέμενοι, ἔπειτα σφαλέντες τῇ κρίσει, τὸ λοιπὸν ἔχονται τῶν δοκηθέντων ἀπρὶξ, ὁποῖα ἄττα καὶ τύχοιεν ὄντα· *miseratione quam odio digniores sunt, ac tales quibus ignosci par*

3 He, and he only, is a heretic, according to Augustine, who either devises or follows false and new opinions, for the sake of his own advantage, and especially of his own glory and power.

Salvian urges the duty of toleration towards the Arians, on the

tiam Deus commodat, quia videt eos etsi non recte credere, affectu tamen piæ opinionis errare.

4 De Manichæis audiamus eum, qui in illorum crassis sordibus diu hæsit, Augustinum: *illi sæviant in vos, qui nesciunt quo cum labore verum inveniatur, et quam difficile caveantur errores. Illi in vos sæviant, qui nesciunt quam rarum et arduum sit carnalia phantasmata piæ mentis serenitate superare. Illi in vos sæviant, qui nesciunt quanta difficultate sanetur oculus interioris hominis, ut possit intueri solem suum. Illi in vos sæviant, qui nesciunt quantis gemitibus et suspiriis fiat ut ex quantulacunque parte possit intelligi Deus. Postremo illi in vos sæviant, qui nullo tali errore decepti sunt, quali vos deceptos vident. Ego autem sævire in vos omnino non possum, quos sicut me ipsum illo tempore, ita nunc debeo sustinere, et tanta patientia vobiscum agere, quanta mecum egerunt proximi mei, cum in vestro dogmate rabiosus et cæcus errarem.* Contr. Epist. Manich. &c. c. 2, 3.

5 [o]In Arianam hæresin acriter invehitur Athanasius *Epistola ad Solitarios*, quod prima in contradicentes usa esset ju-

sit, quicumque a vero aberrant. Neque enim volentes palantur et cespitant, sed cum bonum appetant, in judicando decepti, quæ semel visa sunt retinent mordicus, qualiacunque ea fuerint. (Cap. 5.)

[n] *Nemo potest scire nisi judex*] Chrysostomus homilia contra Anathematizantes: *τὸ κεκρυμμένον τῷ τῶν αἰώνων κριτῇ ἀνεπισφαλὲς ἀποφαίνεσθαι, μόνῳ εἰδότι καὶ μέτρα γνώσεως καὶ ποσότητα πίστεως. πόθεν γὰρ ἴσμεν, εἰπέ μοι, παρακαλῶ, ποίοις ῥήμασι κατηγορήσει ἑαυτοῦ ἢ καὶ ἀπολογήσεται ἐν ἡμέρᾳ ὅτε μέλλει ὁ θεὸς κρίνειν τὰ κρυπτὰ τῶν ἀνθρώπων; ὄντως ἀνεξερεύνητα τὰ κρίματα, καὶ ἀνεξιχνίαστοι αἱ ὁδοὶ αὐτοῦ· id quod absconditum, solus sine periculo dijudicet sæculorum judex, cui soli patet et scientiæ mensura et fidei quantitas. Unde enim nos sciamus, dic mihi quæso, quibus verbis ille se accusaturus aut excusaturus est, in die illa qua Deus dijudicabit arcana hominum? vere inscrutabilia sunt judicia ejus, et viæ ejus impervestigabiles.* (Tom. VI. p. 442.)

[o] *In Arianam hæresin*] Non immerito odimus tam mali exempli inter Christianos repertores. Vide eorum sæva facta apud Eusebium *de Vita Constantini* libro I. 5. 38. Socratem libro IV. 29. Procopium *Vandalicorum* I. ubi de Hunericho (cap. 8) et *Gotthicorum* I. de Amalaricho (cap. 13) et Victorem Uticensem, de Semirianis Epiphanius: *τοὺς τὴν ἀλήθειαν διδάσκοντας διώκουσιν, οὐκέτι λόγοις βουλόμενοι ἀνατρέπειν, ἀλλὰ καὶ ἐχθρίαις καὶ πολέμοις καὶ μαχαίραις παραδιδόντες τοὺς ὀρθῶς πιστεύοντας· λύμην γὰρ οὐ μιᾷ*

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ground of their sincerity. [See the passage.]

4 Augustine argues for toleration of the Manicheans, in whose errors he had long shared.

5 Athanasius inveighs against the Arians, because they first called

dicum potestate, et quos non potuisset verbis inducere, eos vi, plagis, carceribusque ad se pertrahere anniteretur: *atque ita*, inquit, *seipsam quam non sit pia, nec Dei cultrix manifestat*, respiciens ni fallor ad illud quod legitur [p] Gal. iv. 29. Similia habet Hilarius oratione ad Constantium. [q] In Gallia jam olim damnati sunt ecclesiæ judicio Episcopi qui ut in Priscillianistas gladio animadverteretur curaverant; et in oriente damnata Synodus quæ in Bogomili exustionem consenserat. Sapienter dixit Plato, [r] errantis pœnam esse, [4] doceri.

LI. 1 [s] Justius illi punientur qui in eos, quos Deos putant, irreverentes atque irreligiosi sunt. Atque hæc causa

πόλει καὶ χώρᾳ εἰργάσαντο, ἀλλὰ πολλαῖς· *Veritatem docentes vexant, neque verbis evertunt, sed odiis, bellis, gladiis tradunt recte sentientes: exitium quippe jam non uni, sed multis urbibus regionibusque attulere.* De Talibus Gregorius episcopus Romanus ad Constantinopolitanum episcopum: (Lib. II. Ind. 2. Ep. 52.) *Nova et inaudita est ista prædicatio, quæ verberibus exigit fidem.* [Male quidem egerunt Ariani: sed non primi tam malum exemplum ediderunt. Jam antea Orthodoxi, ad eos vexandos impulerant Constantinum, ut ex *Historia Ecclesiastica* constat. *J. B.*]

p *Gal. iv.* 29.] Ad quem locum vide Hieronymum, citatum c. qui secundum, 13. causa XXIII. quæst. iv.

q *In Gallia jam olim damnati sunt*] Sulpicius Severus: *tum vero Idacius atque Ithacius acrius instare, arbitrantes posse inter initia malum comprimi: sed parum sanis consiliis sæculares judices adeunt, ut eorum decretis atque executionibus hæretici urbibus pellerentur.* (Lib. II. c. 47.) Mox: *secuti etiam accusatores Idacius et Ithacius episcopi, quorum studium in expugnandis hæreticis non reprehenderem, si non studio vincendi plus quam oportuisset certassent. Ac mea quidem sententia est, mihi tam reos quam accusatores displicere.* (Ibid. c. 50.) Postea: *Martinus apud Treviros constitutus non desinebat increpare Ithacium ut ab accusatione desisteret: Maximum orare, ut sanguine infelicium abstineret; satis superque sufficere ut episcopali sententia hæretici judicati Ecclesiis pellerentur.* Vide et sequentia.

r *Errantis pœnam esse, doceri*] Seneca in Tragœdia (*Herc. Fur.* vers. 1237):

Quis nomen unquam sceleris errori dedit?

et *de Ira* I. 14. *non est prudentis erran-*

in the judicial power against their adversaries; *This shews*, he says, *that their way is not pious;* referring, I think, to Gal. iv. 29: *As then, he that was born after the flesh persecuted him that was born after the spirit, even so it is now.* In Gaul, the bishops were condemned who used the sword against the Priscillianists; and in the east, the Synod which agreed to the burning of Bagomilus. (Plato says wisely, that the proper punishment of him who is wrong*, is to be taught right).

LI. 1 Those may be more justly punished who are irreverent and irreligious towards those whom they believe to be gods. This cause among others was adduced for the Peloponnesian war between the

* Plato says, *of ignorance.* J. B.

inter ceteras allata belli Peloponnesiaci inter Athenienses et Lacedæmonios, et a Philippo Macedone in Phocenses: de quorum sacrilegio sic Justinus: *quod Orbis viribus expiari debuit.* Hieronymus ad Danielis v. *Quamdiu vasa fuerunt in idolio Babylonis, non est iratus Dominus (videbantur enim rem Dei secundum pravam quidem opinionem, tamen divino cultui consecrasse) postquam autem humanis usibus divina contaminant, statim pœna sequitur post sacrilegium.* Nimirum et Augustinus existimat [5]auctum a Deo imperium Romanorum, quod cordi illis fuisset

Thuc. i. 126, etc. Diod. xvi. 60, etc. Lib. viii. 2. p. 581 B.

tes odisse: alioquin ipse sibi odio erit. M. Antoninus libro IX. (§ 11. *Edit. Gatak.*) εἰ μὲν δύνασαι, μεταδίδασκε. εἰ δὲ μή, μέμνησο, ὅτι πρὸς τοῦτο ἡ εὐμένειά σοι δέδοται· καὶ οἱ θεοὶ δὲ εὐμενεῖς τοῖς τοιούτοις εἰσίν. *si potes, meliora doce: si non potes, memento in hoc tibi lenitatem datam. Ipsi Dii lenes sunt talibus.* Chrysostomus Eph. iv. 17 (Tom. VI. pag. 828): τὸν γὰρ ἀγνοοῦντα, οὐ κακῶς πάσχειν οὐδὲ ἐγκαλεῖσθαι, ἀλλὰ μανθάνειν δίκαιόν ἐστιν ὅπερ ἀγνοεῖ· *eum qui ignorat neque malo affici neque accusari oportet, sed æquum est ut discat quæ ignorat.* Valentinianus, laudante Ammiano Marcellino libro XXX. *nec quemquam inquietavit, neque ut hoc coleretur imperavit, aut illud; nec interdictis minacibus subjectorem cervicem ad id quod ipse coluit inclinabat, sed intemeratas reliquit has partes ut reperit.* (Cap. 9.)

[4] Dicit Philosophus, *ignorantis;* ignorantia autem cum errore magnam habet adfinitatem, et hic ab illa sæpe oritur: Προσήκει δέ που [πάσχειν τῷ μὴ εἰδότι] μαθεῖν παρὰ τοῦ εἰδότος. *De Rep.* Lib. I. pag. 337 D. Tom. II. *Ed. H. Steph. J. B.*

[5] *Justius illi punientur qui in eos, quos Deos putant, irreverentes atque irreligiosi sunt*] Vide de hac re egregia apud Cyrillum libro *contra Julianum* V. et VI. Solone auctore Amphictyones bello persecuti sunt Cirrhæos, quod ii templo Delphico vim intulissent. Plutarchus Solone, (p. 83 E.) Sic et qui falso sibi vatum nomen induunt recte puniuntur: consule Agathiam lib. V. (Cap. 3.)

[5] Nescio ubinam id dixerit Augustinus. Certe sic non satis sibi constat, quum ipse Lib. V. cap. xii. *De Civit. Dei* fuse satis ostendat, Romanorum

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Athenians and Lacedæmonians, and by Philip of Macedon against the Phocians: of whose sacrilege Justin says, that *it required to be expiated by the arms of the whole world.* Jerome says, on Daniel v. *As long as the sacred vessels* [of the Hebrews] *were in the idol-temple at Babylon, God was not angry, (for they still seemed to be devoted to divine worship, though accompanied with perverted opinions;) but after that they were polluted by human uses, the punishment straightway follows the sacrilege.*

Augustine thinks that the Roman Empire was favoured by God, because, though their religion was false, they were in earnest about it*; and as Lactantius says, they held to the main duty of man,

* Augustine says that the Roman Empire was favoured by divine Providence on account of their civil virtues, *De Civit. Dei*, Lib. v. c. 12. J. B.

quamvis falsa religio: et, ut Lactantius loquitur, summum hominis officium, etsi non reipsa [6] tamen proposito tenerent.

2 Et supra diximus qualiacunque quæ putantur numina pejerata a vero numine vindicari: *Punitur, quia tanquam* vii. *de Ben.* c. 7. *Deo fecit*, ait Seneca: *opinio illum sua obligat pœnæ.* Sic *De Benef.* iii. 6. accipio et illud Senecæ: *Violatarum religionum alinbi atque* *De Leg.* lib. x. p. 907. *et seqq.* *alinbi diversa pœna est: sed ubique aliqua;* et quod Plato capitis damnat religionis temeratores.

Imperium auctum Providentia divina, non quod illis cordi fuisset, quamvis falsa Religio, sed ob eorum virtutes Civiles. *J. B.*

[6] Locus est *Instit. Divin.* Lib. II. cap. 3. num. 14. *Ed. Cellar.* ubi Lactantius loquitur de Idololatris in universum. Neque locus Senecæ, qui mox sequitur, satis recte heic aptatur. *J. B.*

though not in truth, yet in purpose*.

2 We have already said that even imaginary deities when appealed to by perjured persons, have their cause taken up by the true God. He is punished, says Seneca, because he did it, as to God; his own opinion binds him to punishment. And so I take that other passage of Seneca: The punishment of violating religion is different in different places, but some punishment there everywhere is. So Plato condemns those who do not believe in the existence of the gods, to imprisonment or death (Laws, b. x. end).

* Lactantius is speaking of idolatry in general: *Instit. Div.* Lib. II. c. 3. The passage from Seneca is not appropriate. J. B.

CAPUT XXI.

DE PŒNARUM COMMUNICATIONE.

I. *Pœna quomodo transeat ad eos qui delicti sunt participes.*

II. *Communitas aut rectores tenentur ex subditi delicto, si adsit scientia et non prohibitio cum prohibere possint et debeant:*

III. *Item ex receptu eorum qui alibi deliquerunt.*

IV. *Nisi aut puniant aut dedant: quod exemplis illustratur.*

V. *Jura supplicum ad infortunatos, non ad nocentes pertinere: cum exceptionibus.*

VI. *Defendi tamen supplices dum de causa cognoscatur: et ex quo jure facienda cognitio.*

VII. *Quomodo delicti rectorum participes sint subditi, aut communitatis hi qui ejus membra sunt: et quomodo differant pœna communitatis et pœna singulorum.*

VIII. *Pœnæ jus in universitatem quamdiu duret.*

IX. *An sine delicti communicatione pœna transeat.*

X. *Distinctio ejus quod directo infertur et in consequentiam venit.*

XI. *Distinctio ejus quod fit occasione peccati et quod ex causa peccati.*

XII. *Proprie loquendo neminem juste punire ob delictum alienum, et cur?*

XIII. *Non filios ob parentum delicta:*

XIV. (*Respondetur ad Dei facta* [vel potius, *ad objectionem petitam ex Dei factis*] *circa filios nocentum.*)

XV. *Multo minus cognatos alios.*

XVI. *Posse tamen liberis et cognatis nocentum aliquid negari, quod alioqui habere poterant: cum exemplis.*

XVII. *Nec subditos proprie puniri posse, ob regis delictum:*

XVIII. *Nec singulos qui non consenserunt, ob delictum universitatis.*

XIX. *Hæredes ad pœnam, qua pœna est, non teneri: et cur?*

XX. *Teneri tamen si pœna in aliud debiti genus transierit.*

I. 1 QUOTIES de pœna communicanda quæritur[1], aut de iis quæritur [a]qui delicti sunt participes, aut de aliis. Qui delicti participes, non tam ex alieno quam ex suo

[1] Confer heic PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. c. iii. § 28. *et seqq.* ac cap. vi. § 12. *J. B.*

[a] *Qui delicti sunt participes*] Tertullianus *de Resurrectione Carnis: dicent enim ministros et socios habere arbitrium ministrandi atque sociandi, et potestatem suæ voluntatis in utrumque, homines*

CHAPTER XXI. *Of the Punishment of Accessaries.*

I. 1 When we speak of the extension of punishment from one person to others, we speak either of those who are partakers in the

delicto puniuntur. Hi qui sint ex his quæ supra de damno injuria dato dicta sunt intelligi potest. Ferme enim iisdem modis in delicti partem quis venit quo in damni dati: non tamen semper, ubi damni obligatio est, etiam delictum est, sed tum demum si qua malitia notabilior accesserit, cum ad damni dati obligationem sæpe qualiscumque culpa sufficiat.

2 Ergo [b]qui factum vitiosum jubent, qui consensum requisitum adhibent, [c]qui adjuvant, [d]qui receptum præstant, aliove modo in ipso crimine participant: [e]qui consilium dant, [f]laudant, assentantur: qui cum ex jure proprie dicto teneantur vetare [g]non vetant, aut cum teneantur ex simili jure opem ferre injuriam patienti non ferunt: qui non dissuadent

scilicet et ipsos; Idcirco cum auctoribus merita communicare, quibus operam sponte accommodant. (Cap. 16.)

[b] *Qui factum vitiosum jubent, qui consensum requisitum adhibent*] *Saulus manibus omnium lapidabat.* Augustinus sermone v. *de Sanctis*, cap. 4. similia sermone ejusdem argumenti primo, c. 3. et sermone xiv. [Qui omnes Sermones falso adscripti sunt Augustino.]

[c] *Qui adjuvant*] Ope. *Institutionibus de furtis*, [immo *De Obligat.* ex delict.] § interdum, II. *Edicto Theuderici*, c. 120.

[d] *Qui receptum præstant*] Hieronymus [aut quisquis alius scripsit opus illud, p. 53 D. Tom. VII. *Ed. Bas.* in cap. 29] super parabolas: *non fur solum, sed ille reus tenetur qui furti conscius quærente possessore non indicat.* Chrysostomus *de Statuis* XIV. οὐ γὰρ οἱ ἐπιορκοῦντες μόνον, ἀλλὰ καὶ οἱ συνειδότες μὲν, περιστέλλοντες δὲ, κοινωνοῦσι τῶν ἐγκλημάτων· *non enim perjuri soli, sed et qui, conscii cum sint, celant perjuria, criminis tenentur.* (Tom. VI. pag. 555, 556. *Edit. Savil.*)

[e] *Qui consilium dant*] Vide *Institutiones et Edictum Theuderici* dictis locis. Andocides ex lege Attica, τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον· *qui consilium dedit eum non minus pœna teneri quam qui manu rem effecerit:* [Orat. I. *De Mysteriis*, pag. 219. *Ed. Wech.*] οὐ γὰρ ἦν πραχθῆναι μὴ βουλευσαμένου· *neque enim sine consilio res facta fuisset*, ait Aristoteles *de Poetica* cap. 17. [Immo *de Rhet.* I. 7.]

[f] *Laudant, assentantur*] Chrysostomus I. ad Romanos circa finem: καὶ γὰρ

delict, or of others. Those who are partakers in the delict are not punished so much for another's delict as for their own. Who these are, may be understood from what has been said above concerning damage wrongfully inflicted. For generally, a person comes to be a sharer in the delict, in the same way in which he comes to be a sharer in the damage done; yet it is not always true that when a person is bound for the damage, he is also liable to punishment; but only when there has been, besides, some notable malice; whereas to make a person bound for the damage, any fault whatever often suffices.

2 Therefore they who command a vicious act, they who give the consent which is requsite, they who assist, who receive the things, or in any other way participate in the crime itself; they who give their counsel towards it, who praise it, who assent to it; those who being bound

cum dissuadere debeant: qui factum reticent quod notum facere ex jure aliquo tenebantur; hi omnes puniri possunt, si in ipsis talis sit malitia quæ ad meritum pœnæ sufficiat, secundum ea quæ proxime tractata sunt.

II. 1 Exemplis res fiet illustrior. Communitas ut alia ita et civilis non tenetur ex facto singulorum, sine facto suo, aut omissione: bene enim Augustinus; *aliud est quod in populo quisque habet peccatum proprium, aliud quod commune, quod uno animo fit, et una voluntate ad aliquid multitudine comparata committitur.* Hinc in formula federum est: [h] *Si defexit publico consilio.* Locri apud Livium ostendunt senatui Romano culpam defectionis procul a consilio

In Levit. Quæst. 26.

Lib. xxix. 17.

τοῦ πλημμελοῦντος ὁ τὴν ἁμαρτίαν ἐπαινῶν χαλεπώτερος· pejor peccante qui peccatum laudat. (Tom. III. pag. 28.) Qui facinorosum adstans hortatur, pro faciente habetur lege Langobardica, Lib. I. tit. ix. § 25. Vide quæ ex Philone et Josepho mox proferemus ad § 17.

[g] *Non vetant*] Chrysostomus I. *adversus Judæos:* (Tom. VI. pag. 319.) *ὥσπερ οὖν οὐχ οἱ κλέπτοντες μόνον, ἀλλὰ καὶ οἱ κύριοι μὲν ὄντες κωλῦσαι, μὴ κωλύοντες δὲ τὴν αὐτὴν ἐκείνοις διδόασι δίκην· sic non ii modo qui furtum fecere, sed et qui prohibere cum possent non prohibuere, puniuntur, et quidem pari uterque pœna.* Sic eum qui sanari ægrotum prohibet, teneri quasi vulnerasset, ait idem Chrysostomus II. ad Cor. c. vii. (Tom. III. p. 627.)

[h] *Si defexit publico consilio*] Chrysostomus *de Statuis* III. *ὅτι οὐ κοινὸν τῆς πόλεως τὸ ἁμάρτημα γέγονεν, ἀλλὰ ἀνθρώπων τινῶν ξένων καὶ ἐπηλύδων, οὐδὲν λογισμῷ ποιούντων, ἢ τόλμῃ καὶ παρανομίᾳ πάσῃ. καὶ οὐκ ἂν εἴη δίκαιον ὑπὲρ τῆς ὀλίγων ἀπαιδευσίας πόλιν τοσαύτην ἀναρπάζεσθαι. καὶ τοὺς οὐδὲν ἠδικηκότας διδόναι δίκην. Non commune fuisse delictum civitatis, sed extraneorum et advenarum, qui cuncta temeritate ac legum ignorantia potius quam ratione facerent: neque vero æquum, ut ob paucorum imperitiam tanta urbs everteretur et pœnam ferrent culpæ exsortes.* (Tom. VI. pag. 473.) Ammianus libro XXX. *de Quadis: nihil ex communi mente procerum gentis delictum asseverantes in nostros.* (Cap. 6.)

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by their special rights to forbid it, do not forbid it; or being bound by similar rights to give aid to the person who suffers wrong, do not do so; those who do not dissuade when they ought to dissuade; who keep silence with regard to a fact which they were bound by some right to make known; all these may be punished, if there be in them such malice as suffices for penal desert, according to what has already been said.

II. 1 The thing will be made clearer by example. A Civil Community, like any other Community, is not bound by the act of an individual member thereof, without some act of its own, or some omission. Augustine says well, *There is a difference between the fault that, in a people, each person has of his own; and a fault common to all, which is committed with one mind and one will.* And accordingly, in

Lib. xxxv. 31. publico abfuisse. Narrante eodem, Zeno pro Magnetibus deprecator apud T. Quintium et legatos qui ei aderant flens petebat, ait Livius, *ne unius amentiam civitati assignarent; suo quemque periculo furere.* Et Rhodii apud senatum publicam causam a privatorum causa segregant, dicentes, *nullam esse civitatem quæ non improbos cives aliquando, et imperitam multitudinem semper habeat.* Sic nec pater ex delicto liberorum tenetur, nec dominus ex servi, nec alii qui præsunt, nisi aliquid in ipsis vitiosum hæreat.

Apud eumd. xlv. 23.

2 Ex his autem modis quibus rectores aliorum in crimen veniunt, duo sunt qui maximum usum habent, et diligenti consideratione indigent: patientia et receptus. De patientia ita habendum est, qui scit delinqui, qui prohibere potest et tenetur, nec prohibet, eum ipsum delinquere. Cicero *in Pisonem: neque vero multum interest, præsertim in Consule, utrum ipse perniciosis legibus, improbis concionibus rempublicam vexet, an alios vexare patiatur.* Brutus ad Ciceronem: *alienæ igitur, inquies, culpæ me reum facies? prorsus alienæ, si provideri potuit ne existeret.* ἴσον τῷ πλημμελεῖν τὸ μὴ κωλύειν τοὺς πλημμελοῦντας, ait Agapetus ad Justinianum; *par est delinquere et delinquentes non prohibere. Quisquis patitur peccare peccantem, is vires subministrat audaciæ,* ait Arnobius. *In cujus manu est ut prohibeat, jubet agi si non prohibet admitti,* ait Salvianus. Augustinus vere: *qui desinit obviare cum potest, consentit.*

Cap. 5.

Epist. 55. *ad Brut.*

Parænet. c. 28.

Adv. Gent. iv. p. 149.

De Gubern. Dei, vii. 19. *in fin.*

Treaties the formula is, [Liv. I. 24,] *If he violate this by public act.* The Locrians in Livy plead to the Roman Senate that their defection was by no means a public act. So again Zeno, pleading for the Magnesians, begged with tears *that they would not ascribe to the whole city the insanity of one man: that each one's madness must be at his own risk.* And the Rhodians, before the Senate, separate the public cause from that of private persons, saying that there is no city which has not often wicked citizens, and always a senseless mob. So the father is not bound by the delict of the son, nor the master by that of the servant, except there be some cause of blame in themselves.

2 But of the ways in which rulers come to share in the crime of others, there are two which are most common, and require diligent consideration: their allowing and their receiving.

With regard to *allowing,* it is to be held that he who knows of the commission of the offense, who can, and is bound to prevent it, and who does not, does himself offend. So Cicero against Piso; Brutus, in a letter to Cicero; Agapetus to Justinian; Arnobius; Sal-

3 Sic qui mancipium cum possit eximere prostitutum esse patitur, pro prostituente habetur Romanis legibus. Si servus sciente domino occidit, in solidum dominum obligat: ipse enim videtur dominus occidisse. Et lege Fabia in dominum animadvertitur: si servus domino sciente alienum servum subduxerit.

L. 7. D. qui sine manum. *L. 2. de nox. act. princ.* Paul. Lib. v. *sent. Tit.* 30. § 2.

4 Sed, ut diximus, præter scientiam requiritur facultas prohibendi. Et hoc est quod aiunt leges [1]scientiam, cum puniri jubetur, accipi pro patientia, ut qui prohibere potuit teneatur si non fecerit; et scientiam hic spectari quæ habeat et voluntatem: scientiam accipi cum consilio: ideoque non teneri dominum si servus in libertatem proclamaverit, si dominum contemserit: quia scilicet culpa vacat qui scit quidem, sed prohibere non potest. Sic parentes tenentur ex delictis filiorum, sed eorum demum quos habent in potestate. Vicissim, etiamsi in potestate habeant et alioqui prohibere potuerint, non tenebuntur nisi et sciverint. Pariter enim concurrere hæc debent, scientia et non prohibitio, ut quis ex facto alieno teneatur: quæ omnia ad subditos pari ratione sunt referenda: veniunt enim ex naturali æquitate.

L. 45. ad l. Aquil. *L. 1. § 1. si fam. furt. f.* *L. 4. de nox. act.* *L. 50. de R. J. l. 109. eo tit.* *L. 1. § qui cam. in fine l. 15. § 1. l. 19. D. quo nat. inf.* *L. 7. § 5. D. Arbor. furt. caesr.*

5 Egregie Proclus ad illud Hesiodi (*Oper. et Dier.* vers. 240): p. 64.

[1] *Scientiam, cum puniri jubetur, accipi pro patientia*] Lege Wisigotthorum libro VIII. tit. iv. cap. 11. cap. 26. et alibi. libro IX. tit. 1. c. 1.

vian; Augustine.

3 So he who allows his slave to be prostituted when he could prevent her, is held by the Roman Law to have prostituted her. If a slave commit homicide with the knowledge of his master, the master is equally liable, for he is considered as guilty of the homicide. And by the Fabian law, the master is punished if his servant, with his knowledge, has drawn away and secreted another servant.

4 But as we have said, there is required, to produce this liability, not only knowledge, but the power of prevention. And this is what the Laws say; that knowing, when it is directed to be punished, is taken for allowing; so that he who could have prevented, is held bound if he did not do so; and that the knowing here spoken of is considered as combined with willing; and that knowledge is taken along with purpose; and therefore, that the master is not bound if the slave has asserted and appealed to the laws for his liberty; or, if he have disregarded his master; for he is blameless who knows, but cannot prevent.

5 When Hesiod says,

Often the whole of the city is punished for one man's injustice,

Πολλάκι καὶ ξύμπασα πόλις κακοῦ ἀνδρὸς ἐπαυρεῖ·
Sæpe luit populus pœnas unius iniqui,

ait: *ὡς ἐξὸν κωλύειν, μὴ κωλύουσα τὴν τοῦ ἑνὸς πονηρίαν, ut qui cum prohibere possit non prohibet unius malitiam.* Sic in exercitu Græcorum, ubi Agamemnon ipse et alii concilio communi suberant, non immerito:

Horat. Lib. i. Epist. ii. 14.

Quidquid delirant reges, plectuntur Achivi:

[k] Ipsorum enim erat cogere Agamemnonem, ut sacerdoti filiam redderet. Sic post eorundem classis exusta narratur:

Virg. Æn. i. 39.

[l] Unius ob culpam et furias Ajacis Oïlei,

qua de re Ovidius *Metam.* xiv. (vers. 468):

Virgine rapta
Quam meruit pœnam solus, digessit in omnes;

quia ceteri non impedierant, ne virgo sacerdos raperetur. Apud Livium est: *Propinqui regis Tatii legatos Lauren-*

Liv. i. 14.

[k] *Ipsorum erat cogere Agamemnonem*] Ita hanc rem explicat Cyrillus libro v. *contra Julianum,* (pag. 175. *Edit. Spanhem.*)

[l] *Unius ob culpam et furias Ajacis Oïlei*] Euripides *Troadibus* sic loquentem Neptunum facit (vers. 70):

Οἶδ', ἡνίκ' Αἴας εἷλκε Κασσάνδραν βίᾳ.
Cum Phœbadem vi traxit Ajacis manus.

Et Minervam respondentem (vers. 71):

Κοὐδέν γ' Ἀχαιῶν ἔπαθεν, οὐδ' ἤκουσ' ὕπο.
Nilque audiit, nil passus a Græcis mali est.

Pari jure omnes Antiochenos statuarum crimine involvit Chrysostomus, prima [Immo ii. p. 464, 465. Tom. v.] ejus argumenti oratione: *ἰδοὺ τὸ ἁμάρτημα γέγονεν ὀλίγων, καὶ τὸ ἔγκλημα γίνεται κοινόν. ἰδοὺ δι' ἐκείνους ἅπαντες δεδοίκαμεν νῦν καὶ τῶν ἐκείνοις τετολμημένων αὐτοὶ τὰς τιμωρίας ἀναμένομεν. εἰ δὲ προλαβόντες αὐτοὺς ἐξεβάλομεν τῆς πόλεως, καὶ τὸ νενοσηκὸς διωρθώσαμεν μέλος, οὐκ ἂν τὸν παρόντα ἐφοβούμεθα φόβον· Ecce facinus paucorum fuit, accusatio in omnes fertur. Ecce propter illos nunc in metu omnes sumus, et eorum quæ illi ausi sunt pœnam nos ipsi spectamus. Quod si antevertissemus eam, illos de urbe pellendo, et partem morbidam sicut oportet tractassemus, abesset jam a nobis hic timor:* deinde: *δι' αὐτὸ οὖν τοῦτο κολάζου, φησὶ, δίδου δίκην τὴν ἐσχάτην, ὅτι μὴ παρῇς, μηδὲ ἐκώλυες, μηδὲ τοὺς ἀκοσμοῦντας κατεῖχες, μηδὲ ἐκινδύνευες ὑπὲρ τῆς εἰς τὸν βασιλέα τιμῆς. οὐ με-*

Proclus says well, *As having had it in their power to prevent him, and not having done so.* So Horace of Agamemnon,

Though 'tis the kings that are mad, the Achaians suffer the evil.

For they might have compelled him to restore the priest his daughter. And so after the Greek fleet was burnt,

All for the fault of one, for the madness of Ajax Oïleus.

As Ovid says on the same subject,

One constrained the maid, but the penalty spread to the many:

because the others did not prevent the sacred virgin from suffering violence. So Livy about the Laurentian ambassadors, repelled by

tium pulsant. Cumque Laurentes jure gentium agerent, apud Tatium gratia suorum et preces plus potuerunt. Igitur illorum pœnam in se vertit. Huc proprie pertinet illud Salviani de regibus: [m] *Potestas magna et potentissima, quæ prohibere scelus maximum potest, quasi probat debere fieri si sciens patitur perpetrari.* De Gub. Dei, vii. 19. Et apud Thucydidem est: ὁ δυνάμενος παῦσαι, ἀληθέστερον δρᾷ· *magis ille facit, qui potest prohibere.* Lib. i. 69. Sic apud Livium Veientes et Latini Romanis se excusant, quod hostes eorum a subditis suis adjuti essent, se insciis. Lib. i. 30. Lib. vi. 10. Contra Teutæ reginæ Illyriorum non accipitur excusatio, quod diceret non a se, sed a subditis piraticam exerceri: neque enim prohibebat. Polyb. ii. 8. [n] Olim ab Amphictyonibus damnati Scyrii, quod suorum quosdam piraticam exercere patiebantur.

6 Sciri autem facile est ut præsumantur quæ conspicua

τέσχες τῶν τετολμημένων; ἐπαινῶ τοῦτο καὶ ἀποδέχομαι. ἀλλ' οὐδ' ἐπέσχες τὰ γενόμενα· τοῦτο κατηγορίας ἄξιον· *ob hoc ipsum, inquit, fer pœnas, et ultima lue supplicia quod non adfuisti, quod non prohibuisti, quod insanientes non retinuisti, quod pericula non subiisti pro honore Imperatoris. Particeps non fuisti facinorum? Laudo hoc, et boni accipio: sed nec quæ fiebant impediisti; hoc vero jam dignum accusari.*

[m] *Potestas magna et potentissima, quæ prohibere scelus maximum potest*] Philo in Flaccum, (pag. 970 B.) ὁ γὰρ ἐπιπλήττειν ἢ τὸ πανύστατον ἐπέχειν ἂν δυνηθεὶς, εἰ μὴ κεκώλυκε, δῆλος ἦν ἐφιεὶς καὶ ἐπιτρέπων αὐτός· *nam qui castigare, certe inhibere potuit; si non impediit, habendus est permisisse aut etiam probasse quod agebatur.* Dion Galba: τοῖς μὲν γὰρ ἰδιώταις ἀπόχρη μηδὲν ἀδικεῖν. τοῖς δὲ δὴ τὰς ἡγεμονίας ἔχουσιν ἀνάγκη προνοεῖν ὅπως μηδ' ἄλλος κακουργῇ· *Privatis sufficit non delinquere: in imperio agentibus incumbit et hoc curare ne delinquat alius,* (pag. 199 B. *Ed. H. Steph.*) In c. 4. Synodi Pistensis positæ inter *capitula* Caroli Calvi habemus: *Non est liber a consensu qui quod emendare potest emendare negligit: quapropter sine dubio peccati se participem facit.* Vide Nicetam Choniatem libro II. *de Andronico.* (Cap. 3.)

[n] *Olim ab Amphictyonibus damnati Scyrii*] Plutarchus *Cimone*, (pag. 483 C.)

Tatius. So Salvian speaks of kings. And Thucydides says, *He who could prevent it does it.* So in Livy, the Veientes and Rutulians excuse themselves to the Romans, in that their subjects had assisted the enemies of the Romans, they having no knowledge of the fact. And on the other hand, the excuse of Teuta, the queen of the Illyrians, is not accepted, when she said that piracy was not practised by her, but by her subjects; for she did not prevent it. And in ancient times the Scyrians were condemned by the Amphictyons because they allowed some of their people to practise piracy.

6 It is easy to know, so far as presumption goes, acts which are conspicuous and which are frequent. What is done by many, can be

sunt, quæ frequentia, τὸ ἐκ πολλῶν συμβαῖνον, ἀνάγκη μηδένα ἀγνοεῖν· *id quod a multis fit, necesse est a nemine*
p. 353, 354. *ignoretur*, ait Dion Prusæensis Rhodiaca. Ætolos graviter
Lib. iv. 27. reprehendit Polybius, quod cum hostes Philippi videri nollent, suos tamen palam paterentur agere hostilia, et eorum qui talia facerent principes honoribus ornarent.

III. 1 Veniamus ad quæstionem alteram de receptu adversus pœnas. Pœnas, ut ante diximus, naturaliter cuivis, cui nihil simile objici potest, exigere licet. Institutis civitatibus id quidem convenit, ut singulorum delicta, quæ ipsorum cœtum proprie spectant, ipsis ipsarumque rectoribus pro arbitrio punienda aut dissimulanda relinquerentur.

2 At non etiam jus tam plenum illis concessum est in delictis, quæ ad societatem humanam aliquo modo pertinent, quæ persequi ita civitatibus aliis earumve rectoribus jus est, quomodo in civitatibus singulis de quibusdam delictis actio datur popularis: multoque minus illud plenum arbitrium habent in delictis, quibus alia civitas aut ejus rector peculiariter læsus

o *Qui culpæ est compertus*] Deditionem enim præcedere debet causæ cognitio: non decet ἀκρίτους ἐκδιδόναι, *homines dedere causa non cognita*. Plutarchus *Romulo*, (pag. 21 C.) Rex Scotiæ apud Camdenum in anno LXXXV. ait Elizabethæ, transmissurum se in Angliam Fernihurstium, imo et Cancellarium, si præcogitate securitatem violasse vel cædem conscisse liquidis et legitimis probationibus convincerentur.

p *Hoc enim illud est dedere, quod in historiis sæpissime occurrit*] Mithridatem a Tigrane poposcit Lucullus, et non

ignored by none, as Dio Prusæensis says. Polybius heavily blames the Etolians, because, when they were desirous of not being deemed the enemies of Philip, they allowed their people to commit hostile acts, and gave distinguished honours to those who had been prominent in such proceedings.

III. 1 Let us come to the other question, of *receiving*, as a subject of punishment. Punishment, as we have said, according to Natural Law, may be inflicted by any one who is not open to a like charge; though no doubt it is in conformity with civil institutions, that the delicts of individuals, which regard their own community, should be left to that community, and to its rulers, to be punished or passed over as they choose.

2 But there is not the same full power left to them in delicts which in any way pertain to human society in general: for these, other states and their rulers may prosecute, as in particular states there is a prosecutor of certain offenses which any one may put in motion: and much less have they such a power in offenses by which another state or its ruler are especially assailed; and in which, con-

est: et quo proinde nomine ille illave ob dignitatem aut securitatem suam jus habent pœnæ exigendæ, secundum ea quæ ante diximus. Hoc ergo jus civitas, apud quam nocens degit, ejusve rector impedire non debet.

IV. 1 Cum vero non soleant civitates permittere ut civitas altera armata intra fines suos pœnæ expetendæ nomine veniat, neque id expediat, sequitur, ut civitas, apud quam degit [o]qui culpæ est compertus, alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis: [p]hoc enim illud est dedere, quod in historiis sæpissime occurrit.

2 Sic Israëlitæ alii a Benjaminitis postulant, ut dedant facinorosos, Jud. xx. Philistæi ab Hebræis, ut Samsonem quasi maleficum sibi dedant, Jud. xv. Sic Lacedæmonii Messeniis bellum intulerunt, quod interfectorem quendam Lacedæmoniorum non dederent: et alio tempore ob non deditos eos qui missis ad sacrum virginibus vim intulerant. Sic Cæsarem Germanis, ob bellum injuste illatum, dedi voluit Cato. [q]Sic

Paus. iv. 4.

Strab. viii. p. 362.

dedenti bellum intulit; Appianus *Mithridatico*, (pag. 228. *Ed. H. Steph.*) et Plutarchus *Lucullo*, (pag. 505.) Romani Salyas ab Allobrogibus dedi sibi postularunt; Appianus excerptis legationum XI. De Episcopo quem Romani dedere Scythis volebant, vide Priscum excerpto legationum 21. [Scil. pag. 21. *Ed. Hœschel.* et initio Excerpt. Prisci.] Dux Beneventanus a rege Vascone deditus Ferdinando Castellam regenti. Mariana xx. 1.

q *Sic Fabios sibi dedi Galli postulabant*] Plutarchus *Camillo*, (pag. 136, 137.) Appianus excerpto legationum 9.

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sequently, the state or the ruler have, on account of their dignity or security, a right of exacting punishment, as we have said. This right is not to be impeded by the state in which the offender lives, or its ruler.

IV. 1 But since states are not accustomed to permit another state to enter their territory armed for the sake of exacting punishment, nor is that expedient; it follows that the city, where he abides who is found to have committed the offense, ought to do one of two things: either itself, being called upon, it should punish the guilty man, or it should leave him to be dealt with by the party who makes the demand: for this is what is meant by *giving* him *up*, so often spoken of in history.

2 Thus the Israelites demand of the Benjamites, that they give up those who have committed the crimes; Judges xx. The Philistines require from the Hebrews that they give up Samson as an evil-doer; Judges xv. So the Lacedæmonians made war upon the Messenians because they did not give up a man who had killed Lacedæmonians:

Fabios sibi dedi Galli postulabant, quod in se pugnassent. Ab [Dion. Halic. viii. 64.] Hernicis agri sui populatores dedi sibi postularunt Romani; et a Pœnis Amilcarem, non illum nobilem ducem, sed alium qui Gallos concitabat: [r]postularunt et postea Annibalem: item [*Jugurth. Bell.* c. 109.] Jugurtham a Boccho his apud Sallustium verbis: *simul nobis demeres acerbam necessitudinem pariter te errantem et illum* [Liv. xxxviii. 42.] *sceleratissimum persequi.* Ab ipsis Romanis dediti qui Car- [Val. Max. vi. 6.] thaginiensium, quique Apolloniatarum legatis manus intulerant. [Liv. xxxviii. 31.] Achæi a Lacedæmoniis dedi sibi postularunt eos, qui *Lan* vicum oppugnassent, addito, ni dederentur violatum videri fedus. Sic Athenienses per præconem pronuntiarunt, siquis [Diod. Sic. xvi. 93.] Philippo insidias struxisset, et Athenas confugisset, *παραδόσιμον εἶναι, in eo statu esse ut dedi deberet.* Bœoti ab Hippo- [Plut. *Narr. amat.* pp. 774, 775.] tensibus exegerunt, ut qui Phocum interfecerant, dederentur.

3 Quæ omnia tamen sic intelligenda sunt, ut non stricte populus aut rex ad dedendum teneatur, sed ut diximus ad dedendum aut puniendum. Nam ita legimus Eleos bellum intulisse Lacedæmoniis, [2]quod illi in eos qui Eleis injuriam

[r] *Postularunt et postea Annibalem*] Diodorus Siculus in fragmentis, (e Lib. xxv.) Livius. [Vide not. 32. Gronovii.]

[2] Albericus Gentilis, Lib. i. *De Jure Belli*, cap. 21. p. 163. a quo hoc exemplum, ut alia quædam, mutuatus est Auctor noster, in margine testem indicat Pausan. Lib. vi. Locus est non longe ab initio libri, seu cap. 2. ubi ta-

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and, at another time, because those were not given up who had done violence to virgins sent to perform a sacred office. So Cato advised that Cesar should be given up to the Germans, for wrongfully making war upon them. So the Gauls demanded that the Fabii should be given up to them, because they had fought against them. The Romans required those who had plundered their land to be given up to them by the Hernici; and Amilcar, by the Carthaginians, not the celebrated general, but another, who stimulated the Gauls: they afterwards demanded Annibal; and Jugurtha from Bocchus, that, as Sallust puts it, *you may relieve us from the painful necessity of punishing at the same time, you who are in error, and him who is most criminal.* The Romans themselves gave up those who had done violence to the ambassadors of the Carthaginians; and again, of the Apolloniates. The Achæans required the Lacedæmonians to give up those who had attacked the town of Las, adding, that if they did not do so, the league was violated. So the Athenians proclaimed by a herald, that if any one practised secretly against Philip, and then fled to Athens, he would be liable to be given up. The Beotians required of the Hippotians that those who had slain Phocus should be given up.

fecissent non animadverterent, id est, nec animadverterent nec reos dederent: est enim disjunctiva obligatio.

4 [s]Interdum sontes deposcentibus optio datur, quo cumulatius satisfiat. Cærites apud Livium Romanis significant: *transeuntes agmine infesto per agrum suum Tarquinienses, cum præter viam nihil petiissent, traxisse quosdam agrestium populationis ejus, quæ sibi crimini detur, comites: eos seu dedi placeat, dedere se paratos esse, seu supplicio affici, daturos pœnas.* Liv. vii. 20.

5 In fœdere Carthaginiensium et Romanorum secundo, quod apud Polybium exstat, locus male vulgo et distinctus et versus: εἰ δὲ μή, ἰδίᾳ μεταπορευέσθω· ἐὰν δέ τις τοῦτο ποιήσῃ, δημόσιον γινέσθω τὸ ἀδίκημα· *ni id fiat* (quid id sit incertum est: nam quæ præcedunt sunt mutila) *privatim quisque jus suum persequitor. Id ubi fecerit* (nimirum ni jus reddatur) *publicum delictum habetor.* Æschines in responso adversus accusationem Demosthenis de male obita legatione, narrat se, cum apud Philippum Macedonem ageret Lib. iii. 24. p. 262 B.

men simpliciter dicitur, ob verbera inflicta Lichæ Lacedæmonio (non autem Eleo) jussu Hellanodicorum, bellum ortum esse inter Lacedæmonios et Eleos. Sic Auctor minus accurate rem retulit, quam ille, a quo exscripsit non inspecto primo Auctore. *J. B.*

[s] *Interdum sontes deposcentibus optio datur*] Vide fœdus inter reges Angliæ et Daniæ, memoratum Pontano de mari.

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3 All which passages, however, are so to be understood that the people or the king are not strictly bound to give up the person, but, as we have said, to punish him. For thus we read that the Eleans made war on the Lacedæmonians, because they had not punished those who had done injury to the Eleans; that is, they neither punished them nor gave them up. It is a disjunctive obligation.

4 Sometimes the option is given to those who demand the guilty, that the satisfaction may be more complete. The Cærians, in Livy, signify to the Romans that the Tarquinians passing through their land with a small force, though they had asked for nothing but a passage, had drawn along with them some of the country people to join them in the marauding practices of which they were accused: that if it were wished that they should be given up, they were ready to give them up; if it were wished that they should be punished, they were ready to punish them.

5 In the second league of the Carthaginians and Romans, which is extant in Polybius, there is this passage (if rightly read): *If not, let each pursue his own right by private proceedings: if this does not succeed, let it be considered a public delict.* Eschines, in his answer to

de pace Græciæ, dixisse inter alia, æquum esse ut pœnas luerent commissorum criminum non civitates, sed qui peccassent: nec quicquam nocendum civitatibus quæ accusatos judicio sisterent. Quintilianus declamatione CCLV. *Proximos existimo eos transfugis* [t] *a quibus transfugæ recipiuntur.*

p. 480 D.

6 Inter mala quæ ex discordiis civitatum nascuntur et hoc ponit Dion Chrysostomus *oratione ad Nicomedienses:* *ἔστι τοῖς ἀδικήσασι τὴν ἑτέραν πρὸς τὴν ἑτέραν καταφυγεῖν·* *licet his qui alteram injuria affecerunt ad alteram confugere.*

L. ult. D. de legation.

L. 1. c. 40. et 2. c. 32. de Orat. Top. 8. et pro A. Cæc. c. 34.

7 Hic de deditis occurrit quæstio, an si a sua civitate dediti, nec recepti sint ab aliis, cives maneant. Non manere censebat Pub. Mutius Scævola, quia quem populus dedidisset expulisse ex civitate sua videretur, sicut faceret cum aqua et igni interdiceret. [3] Contrariam sententiam defendit Brutus, et post eum Cicero: quæ et verior est, non tamen proprie ob id argumentum quod Cicero affert, quia ut donatio ita deditio

[t] *A quibus transfugæ recipiuntur*] Zonaras *Basilio Porphyrogenneto:* ἔπεμψε πρὸς Χοσρόην ἀξιῶν μὴ παραδέξασθαι τὸν τυραννήσαντα καὶ κατὰ τοῦ οἰκείου δεσπότου γενομένου, ἵνα μὴ καὶ καθ' ἑαυτοῦ ὑπόδειγμα δοίη οὐκ ἀγαθόν· *misit ad Chosroëm postulatum ut dederetur sibi regni affectator, qui domino contraria cepisset arma, neve in semetipsum perniciosum exemplum sta-*

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the accusation of Demosthenes respecting his embassy to Philip, relates that when they discoursed with Philip on the peace of Greece, he said, among other things, that it was just that the punishment of the crimes which were committed should fall, not on the cities, but on the offenders: and that the cities who should bring to judgment the persons accused, ought not to be harmed. (Quintilian says, *Those are next door to deserters who harbour deserters**.)

6 Among the evils which arise from the discords of states, Dio Chrysostom puts this: *It is possible that those who have injured one city, to fly to another.*

7 There occurs the question, of persons given up, if they are given up by one state, and not accepted by the other, do they remain citizens?

P. M. Scævola held that they did not: since when the people had given up a person, it was as if they had expelled him from the city, as if they had interdicted him from fire and water. Brutus, and after him Cicero, defend the opposite opinion. And this is the sounder opinion; not, however, properly for the reason which Cicero gives, that a surrender, like a donation, cannot be understood without

* This passage is not quite to the purpose. W.

sine acceptione non possit intelligi. Nam actus donationis perfectionem non habet nisi ex duorum consensu. At dedere, de quo hic agimus, nihil est aliud quam civem alterius populi potestati permittere, ita ut de eo statuat quod voluerit. Hæc autem permissio jus nullum dat aut adimit; executionis tantum impedimentum tollit. Quare si alter populus concesso jure non utatur, erit is qui deditus est eo loco ut a suo populo possit puniri (quod in Clodio Corsis dedito, nec ab iis accepto Val. Max. vi. 3. evenit) aut non puniri, ut multa sunt delicta in quibus utrumvis fieri potest. Jus autem civitatis, ut et jura et bona alia, non amittitur ipso facto, sed decreto aliquo aut judicio, nisi lex aliqua factum velit haberi pro re judicata, quod hic dici non potest. Hoc denique modo et bona, si dedita nec accepta sint, manebunt cujus fuerant. At si deditio accepta sit, et postea casu aliquo reversus sit is qui fuerat deditus, is civis non erit nisi ex novo beneficio: quo sensu verum est, quod Modestinus de dedito respondit. *L. 4. D. de captivis.*

tueret Chosroës. [Lib. XVII. cap. 5. ubi agitur de Sclero Magistro Militum.] Vide de piratis Lesbi mendose receptis Chalcocondylam libro X. init.

[3] Confer, de hac quæstione, PUFENDORF. *De Jure Nat. et Gent.* Lib. VIII. c. 11. § 9. Et de *L. ult. D. De Legat.* quæ diximus in Notis Gallicis ad hunc locum. *J. B.*

acceptance. For the act of donation is not complete without the consent of two: but the giving up or surrender of which we have spoken is nothing more than leaving a citizen of ours to the power of another people, so that they may determine about him what they will. But this permission does not give or take away any right: it may take away an impediment to the execution of punishment. Therefore if the other people do not use the right which is conceded to it, the person so surrendered will be in a condition to be punished by his own nation, (as happened in the case of Clodius, surrendered to the Corsicans and not accepted by them;) or he may not be punished, as there are many delicts in which the one or the other may take place. And the rights of a citizen, like many other rights and possessions, are not lost by a mere fact, but by some decree or sentence; except there be some law which directs the fact to be considered as a judicial act, which cannot be said in this case. And in the same way, if goods are surrendered but not accepted, they remain whose they were. But if the surrender of a person is accepted, and afterwards he who had been surrendered happens to return, he is no longer a citizen, except by some new concession of citizenship to him: and in this sense the opinion which Modestinus gave respecting a person surrendered, is true.

8 Quæ autem diximus de nocentibus dedendis aut puniendis, non tantum ad eos pertinent qui subditi semper fuerunt ejus apud quem nunc reperiuntur, verum etiam ad eos qui post crimen commissum aliquo confugerunt.

V. 1 Neque obstant illa adeo prædicata [u]supplicum jura et asylorum exempla. Hæc enim illis prosunt qui immerito odio laborant, non qui commiserunt quod societati humanæ aut hominibus aliis sit injuriosum. Gylippus Laco apud Diodorum Siculum agens de illo supplicum jure sic ait: *qui initio jura ista introduxerunt, infelicibus quidem misericordiam, at his qui malo animo injuriam intulerunt, pœnam exspectandam voluerunt.* Postea: *hi vero si dolo malo, si injusta alieni cupiditate in mala hæc inciderunt, ne accusent fortunam, ne supplicum sibi nomen imponant. Id enim jure hominum illis debetur* [x]*quibus innocens est animus, irata fortuna. Horum vero vita plena factis injustis, nullum ipsis locum reliquit qui ad miserationem et perfugium pateret.* Duo illa, fortunam et injuriam, Menander optime distinxit:

Lib. xiii. *bibl.* c. 29.

Apud Stob. *Tit.* 7.

[y] *Ἀτύχημα κἀδίκημα διαφορὰν ἔχει:*
Τὸ γὰρ διὰ τύχην γίγνεται, τὸ δ' αἱρέσει.

[u] *Supplicum jura*] Κοινοὶ ἱκεσίας νόμοι Polybio, et Malcho in *excerptis legationum.* [Hic dicit: *μὴ μέν τοι ὅσιον Γόττοις, ὥσπερ οὐδὲ ἄλλοις ἀνθρώποις, ἱκέτας, καὶ σωτηρίας δεομένους ἀνθρώπους, τοῖς λαβεῖν βουλομένοις ἐκδιδόναι προχείρως.* Pag. 69. *Ed. Hœschel.*]

[x] *Quibus innocens est animus, irata fortuna*] Oraculum vetus [apud Ælianum, *Var. Hist.* III. 44.]

Ἔκτεινας τὸν ἑταῖρον ἀμύνων· οὔ σ' ἐμίανεν
Αἷμα. πέλεις δὲ χέρας καθαρώτερος ἢ πάρος ἦσθα.

Carum occidisti, dum vis succurrere: nullum
Crimen habes: manus est tibi purior ac fuit ante.

[y] *Ἀτύχημα καὶ ἀδίκημα*] Philo *de Judice: ἔλεος ἐπ' ἀτυχήμασιν· ὁ δ' ἑκουσίᾳ γνώμῃ πονηρευόμενος, οὐκ ἀτυχὴς ἀλλ' ἄδικος· misericordia infortuniis debetur; at qui deliberata sententia male agit, non infelix est, sed injustus.* (Pag. 722 A.) Sic M. Antoninus mentem vult inspici: *ἵνα ἐπιστήσῃς πότερον ἄγνοια η γνώμη, καὶ ἅμα λογίσῃ ὅ, τι συγγενές· ut noris ignorantia in aliquo an consilium fuerit, et simul ea*

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8 What we have said of surrendering or punishing criminals, applies not only to those who have always been the subjects of him under whose rule they are now found; but also to those, who, after committing a crime, have fled to any place.

V. 1 Nor is this doctrine impeached by the rights of suppliants, and the cases of asylum, which are so much spoken of. These arrangements are for the advantage of those who are persecuted without deserving to be so; not of those who have committed what is injurious to human society or to other men. So Gylippus says of this right of suppliants. [See.] Menander very properly distinguishes

Injuria illud distat infortunio,
Hoc casus, illam quod voluntas efficit.

Non abit hinc Demosthenis dictum: δίκαιόν ἐστιν ἐλεεῖν οὐ τοὺς ἀδίκους τῶν ἀνθρώπων, ἀλλὰ τοὺς παρὰ λόγον δυστυχοῦντας. (*In Aphob.* I. *sub fin.* p. 556 A.) Quod Cicero ita vertit de inventione secundo: *misereri oportet, qui propter fortunam, non propter malitiam, in miseriis sunt.* (Cap. 36.) Et [4] Antiphanis illud: τὸ ἀκούσιον ἁμάρτημα τῆς τύχης ἐστὶ, τὸ δὲ ἑκούσιον τῆς γνώμης· *quod non sponte fit, fortunæ est; quod sponte, consilii.* Et hoc Lysiæ: (*Orat.* xxv. 3.) οὐδενὶ οὐδὲν ἑκούσιον δυστύχημα γίνεται· *nemini infortunium sponte sua accidit.* Sic in sapientissima lege, quibus telum (*Deut.* xix. 1. *et seqq.*) manu fugisset, quo interfectus esset homo, asyla patebant: servis quoque perfugium dabatur: (*Ibid.* xxiii. 15.) at qui deliberato hominem innocentem occidissent, qui civitatis turbassent statum, his ne (*Exod.* xxi. 14. 1 *Reg.* ii. 29. 2 *Reg.* xi. 13. *et seqq.*) ipsum sanctissimum Dei altare patrocinabatur. Hanc legem Philo explicans ait, ἀσυλίαν ἀνιέροις τὸ ἱερὸν μὴ παρέχεσθαι· (*De spec. leg.* p. 790 D.) *profanis in fano nullum esse receptum.* Nec aliter Græci antiquiores. Nauplium narrantur Chalcidenses Achivis [z] dedere (Plut. *quæst. gr.* 32.) noluisse, sed causa additur, quia satis se purgaverat de his quæ ab Achivis objiciebantur.

consideres qua his cohærent. Sic τὰ ἐξ ἀγνοίας ἢ λήθης, *quæ ab ignorantia aut oblivione veniunt*, et τὰ ἐκ προνοίας, *quæ ex consulto fiunt*, distinguit Totilas apud Procopium *Gotthicorum* III. cap. 9. [In loco Marci Antonini, qui legitur Lib. IX. § 22. *Edit. Gataker.* verba ultima male vertit Auctor, quæ significant, ut Interpres ille eruditissimus reddit: *cogitesque simul esse tibi cognatum*, i. e. natura. *J. B.*]

[4] Non Antiphanis, ut habent omnes Editiones, sed ANTIPHONTIS, Orat. XIV. XV. pag. 134. ⟦p. 140, 21⟧. Nomen idem eodem modo corruptum infra legitur, § 16. Locus autem mox sequens Lysiæ, exstat Orat. XXX. seu *contra Philon.* cap. iii. pag. 473 ⟦p. 187. 39⟧. *J. B.*

[z] *Dedere noluisse*] Recepit nec dedidit Pipinus ex Neustria ob tyrannidem ad se confugientes. Est id apud Fredegarium in rebus Pipini ad annum IↃC LXXXVIII. Etiam ab ecclesia Romana ad se confugientes recepit Ludovicus Pius Imperator, ut apparet ex ejus decreto facto anno IↃCCCXVII. inserto in tomum II. *conciliorum Galliæ:* et Carolus Calvus, qui ex parte fratris sui

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misdeed from misfortune: the former, he says, happens by will, the latter by chance. So Demosthenes, and Cicero after him, say that *the proper objects of pity are those who are in distress through fortune, not through malice.* And so that of Antiphon*, and that of Lysias. [See.] So in the Hebrew law, he who had killed a man by chance, might take to the city of refuge: but they who had deliberately killed an innocent man, or disturbed the state of the city, were not to be protected, even by the altar of God. So Philo. And the more ancient Greeks had the

* *Orat.* XIV. XV. p. 134. Ed. Wech. not Antiphanes. J. B.

2 Erat apud Athenienses Ara Misericordiæ, cujus meminerunt [5]Cicero, Pausanias, [a]Servius, etiam Theophilus in Institutionibus, et quam late describit Papinius duodecimo *Thebaidos.* At quibus patebat illa? Audi poëtam (vers. 483):

Lib. i. seu *Attic.* c. 16. Lib. i. 2. § 1.

Et miseri fecere sacram:

mox convenisse eo ait (vers. 507):

Victos bellis patriaque a sede fugatos,
Regnorumque inopes.

Panath. p. 187 B. Tom. I.

Aristides [b]propriam Atheniensium laudem esse ait, τὴν τῶν πανταχόθεν δυστυχούντων ὑποδοχὴν καὶ παραμυθίαν, *quod omnibus undique infelicibus perfugio ac solatio esset.* Et alibi: τοῖς καθ' ἑκάστους ἀτυχοῦσι κοινὴ πᾶσιν ὕπεστιν εὐτυχία, τὸ τῆς πόλεως ταύτης ἦθος ὑφ' οὗ σώζονται· *his qui ubivis locorum infelices sunt, communis eis una est felicitas, bonitas civitatis Atheniensis, per quam salutis compotes fiunt.* Apud Xenophontem Patrocles Phliasius in oratione quam Athenis habebat: ἐζήλουν τήνδε τὴν πόλιν, ὅτι πάντας καὶ τοὺς ἀδικουμένους καὶ τοὺς φυβουμένους ἐνθάδε καταφεύγοντας ἐπικουρίας δεομένους ἤκουον τυγχάνειν· *laudabam hanc urbem, quod omnes aut injuria affectos, aut sibi prœmetuentes, si huc perfugissent, auxilii compotes fieri intellexeram.* Idem sensus est in epistola Demosthenis pro Lycurgi liberis. Itaque Œdipus ad Colonum confugiens, in ejus nominis tragœdia, [c]apud Sophoclem ita testatur (vers. 521, etc.):

Orat. Leuct. I. p. 89 A. Tom. II.

Hist. Græc. vi. 5. n. 38.

p. 114 B.

Ludovici ad se profugerant: Aymonius Lib. v. cap. 34. De Cegena Patzinaca non dedito postulanti Tyracho vide in Constantini Monomachi rebus Zonaram, (Lib. XVII. cap. 26. *Ed. Reg.*) Sic et Osmanes ab Inungino præfecto non deditus Eskisari: Leunclavius libro II. *Historiæ Turcicæ.* Albuquercium Lusitani non dedidere, ut memorat Mariana XVI. 18.

[5] Apud Scholiastem Statii, in Theb. XII. 481. ubi quasi ex Libro Tusculanarum id refert. Sed nil de ea Ara ibi reperitur. *J. B.*

[a] *Servius*] Ad VIII. *Æneidos,* (vers. 342.)

[b] *Propriam Atheniensium laudem*] Quam Arragoniis tribuit Mariana XX. 13.

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same rule. The Chalcidians would not give up Nauplius to the Achaians; but the cause is added, because he had sufficiently cleared himself from the accusations of the Achaians.

2 There was at Athens an Altar of Mercy, mentioned by Cicero*, Pausanias, Servius, Theophilus, and described at length by Statius in his *Thebaid.* But to whom was it accessible? The poet says, *The miserable made it sacred:* and adds, that *those who came together there,*

* Quoted by the Scholiast on Statius, *Theb.* XII. 481, where he refers it to the Tusculans: but in that work there is nothing about such an altar. J.B.

Heu, Cecropidæ, mala multa tuli:
Sed nempe tuli: Deus est testis,
Nihil horum sponte patratum.

Respondet Theseus (vers. 565, et seq.):

Non me pigebat hospitem, qualem, Œdipe,
Te tueor, omni sospitare in tempore,
Homo esse memini.

Similiter Thesei filius Demophon, [G]cum Herculis posteri Athenas confugissent, sic ait:

Hæc patria nostra semper invalidos solet,
Sed jure fretos, ope sua defendere.
Antehac amicis mille relevandis tulit
Discrimina: et nunc aliud in promtu imminet.

Et hoc illud factum est, ob quod Athenienses præcipue prædicabat Callisthenes: τούτους γὰρ καὶ πρὸς Εὐρυσθέα πολεμῆσαι ὑπὲρ τῶν παίδων τοῦ Ἡρακλέους τυραννοῦντα ἐν τῷ τότε τῆς Ἑλλάδος· *hos enim et in Eurysthea bellum suscepisse* [d]*pro Herculis liberis, cum Græciam Eurystheus tyrannide premeret.*

3 Contra de maleficis hoc habes in eadem tragœdia:

Hunc qui facinorum conscius, nec legibus
Fidens ad aras volvitur supplex Deûm,
Trahere ad tribunal nulla religio mihi:
Mala semper æquum ferre qui fecit male.

Gepidæ perire omnes malunt quam Ildigisalem Romanis aut Longobardis dedere. Procopius *Gotthicorum* IV. (*Hist. Miscell.* cap. 27.)

[c] *Apud Sophoclem*] Vide totum locum; est enim lectu dignus.

[G] Non Demophon, sed Chorus apud Euripidem *Heraclid.* vers. 330, *et seqq.* Versus autem, qui mox num. 3. sequuntur, et quasi *ex eadem tragœdia* adducuntur, sunt ex incerta Tragœdia Euripidis, apud Stobæum, *Germ.* XLIV. Tit. 46, [p. 304]. Ed. Auctoris nostri, qui inde versionem suam huc transtulit. Incipiunt Græci versus ita: Ἐγὼ γὰρ ὅστις μὴ δίκαιος ὢν ἀνήρ, etc. *J. B.*

[d] *Pro Herculis liberis*] Vide Euripidem *Heraclidis*, et Apollodorum (*Bibl.* L. II. c. 8. § 1.)

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were those conquered in war, those driven from their country, those who had no state to which they belonged. So Aristides, in praise of the Athenians, says that Athens was the refuge for the wretched. In Xenophon, Patrocles the Phliarian says the same. So Demosthenes; and Sophocles in the *Œdipus Coloneus;* and Demophon, [rather the Chorus, in Euripid. *Heracleid.* v. 330, &c. J.B.] And this is the point for which Callisthenes especially praised the Athenians.

3 On the other hand, in the same tragedy*, one of the characters

* Not the same, but an uncertain tragedy of Euripides in Stobæus: *Germ.* XIV. Tit. 46. J. B.

Idem *Ione* (vers. 1315, et seqq.):

Non enim tangi decet
Manu nocente numina, at justum fuit
Piis patere templa contra injurias.

Adver. Leocr. p. 156. [[p. 159.]] Narrat orator Lycurgus Callistratum quendam, qui capital commiserat, consulto oraculo responsum accepisse, si Athenas iisset, *τεύξεσθαι τῶν νόμων, consecuturum quod jus esset:* illum vero confugisse [e] ad id quod Athenis sanctissimum esset altare, impunitatis fiducia: at nihilominus occisum eum ab observantissima suarum religionum civitate, atque ita impletam oraculi fidem. *Ann.* iii. 60. Et Tacitus improbat receptum suo sæculo morem, per Græcas urbes flagitia hominum ut ceremonias Deum protegendi. *Ibid.* c. 36. Apud eundem est: *principes quidem instar Deorum esse: sed neque a Diis nisi justas supplicum preces audiri.*

4 Tales ergo aut puniendi, aut dedendi, aut certe amo-

[e] *Ad id quod Athenis sanctissimum esset altare*] In Lusitania Ferdinandum cubiculi præfectum e templo ad quod confugerat raptum, et igne combustum, ob vitium nobili virgini illatum, narrat Mariana libro XXI. Vide et de asylis librum viri magni Pauli Veneti, societatis *servorum* quæ dicitur.

[7] Non erat Persa, sed Lydus. Inspice locum Herodoti, in margine a me distincte indicatum. *J. B.*

[f] *Perseus rex Macedonum*] Narrat et Appianus excerpto legationum num. 20. Simile illud in latina vita Themistoclis. [Corn. Nepos: c. 8], *cum ab Atheniensibus et Lacedæmoniis exposceretur publice, supplicem non prodidit* (Admetus rex Molossorum) *monuitque ut consuleret sibi: itaque Pydnam eum deduci jussit, et quod satis esset præsidii dedit.* Sic et Ildisgim Langobardum dimittunt Gepidæ apud Procopium

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says that he knows no piety which withholds him from dragging guilty men from the altar to the tribunal. And the same author, in the *Ion*, says, that guilty men should not go to the gods for refuge, but that the temples should be open to the pious to protect them from injury. Lycurgus the orator relates that a certain Callistratus, who had committed a capital offense, having consulted the oracle, received for answer that if he went to Athens, *he would have the benefit of the law:* that accordingly, he took refuge at the most sacred altar at Athens, depending upon impunity; but that he was nevertheless put to death by the city, strictly careful of its religious observances; and thus the oracle was fulfilled. Tacitus blames the custom which was in his time prevalent, of protecting, in the Greek cities, the crimes of men as the ceremonies of the gods. The same writer says, that *Princes are indeed like gods; but that even the gods hear only the just prayers of suppliants.*

4 Such persons, therefore, are either to be punished, or surrendered, or at least, removed. So the Cymeans, not being willing either

vendi. Sic narrante Herodoto Cymæi Pactyen [e]Persam cum nec dedere vellent, nec retinere auderent, permiserunt abire Mitylenen. Demetrium Pharium qui bello victus ad Philippum Macedonum regem fugerat, a rege depoposcerunt Romani. [f]Perseus rex Macedonum, in purgatione ad Martium, de his agens qui Eumeni insidiati dicebantur: *ego istos, ut primum in Macedonia esse admonitus a vobis comperi, requisitos abire ex regno jussi, et in perpetuum interdixi finibus meis.* Samothraces Euandro qui Eumeni insidias struxerat, denuntiant, liberaret religione templum.

Lib. i. 160, 161. Liv. xxii. 33. Liv. xlii. 41. Liv. xlv. 5.

5 Ceterum jus hoc, quod diximus, deposcendi ad pœnas eos qui extra territorium profugerunt, hoc et proxime actis sæculis et plerisque Europæ partibus, circa ea demum crimina usurpatur quæ statum publicum tangunt, aut quæ eximiam habent facinoris atrocitatem. Minora mutua dissimulatione transmitti invaluit, [g]nisi federis legibus propius quiddam con-

Gotthicorum III. (cap. 35.) Adde epistolam Theuderici ad Trasamundum regem Vandalorum de Giselico suscepto, [apud Cassiodor.] v. 43 et 44. Et ea quæ in vita regis Ludovici. Sic Christophorum Sborovium a se amovit Imperator Rudolphus II. teste Thuano Lib. LXXXIII. in anno cIↃIↃLXXXV. Elisabetha Scotis respondet se Bothwellum aut reddituram aut ex Anglia exterminaturam. Camdenus id habet circa ann. cIↃIↃXCIII. (pag. 607.) De Alfonso Gegionis comite a rege Galliæ damnato, ac negato ei in Hispaniam receptu, vide Marianam xix. 6.

[g] *Nisi federis legibus propius quiddam convenerit*] Ut in federe Helvetiorum cum Mediolanensibus Simlerus recitat. Federa Anglorum cum Gallis dedi rebelles et profugos volunt, cum Burgundis expelli. Camdenus in anno cIↃIↃC. (pag. 758.)

to give up Pactyas the Persian, or to retain him, allowed him to go to Mitylene. Demetrius of Pharos, who, when defeated, had fled to Philip, king of Macedon, the Romans demanded from the king. Perseus, king of Macedon, in defending himself to Martius, and speaking of those who were said to have laid wait for Eumenes, said that he had commanded them to depart from his kingdom, and never to return. The Samothracians denounced to Evander, who had practised secretly against Eumenes, the necessity of freeing their temples from pollution.

5 But this right of demanding, for the sake of punishing, those who have fled out of the territory, is, in this and the last preceding ages, in most parts of Europe, used only with regard to those crimes which affect the public good, or have some peculiar features of atrocity. It has become the custom to overlook on both sides smaller offenses, except there be a treaty with some especial provisions on this subject. It is to be remarked, however, that robbers and pirates who have made themselves strong and formidable, may be received and

venerit. Sed et hoc sciendum est, latrones ac piratas qui ita invaluerunt ut formidabiles se fecerint, recte recipi ac defendi, pœnam quod attinet, quia interest humani generis ut si aliter non possunt impunitatis fiducia a maleficiis revocentur, ejusque negotium gerere quivis populus aut populi rector potest.

VI. 1 Notandum et hoc, interim dum de causæ justitia cognoscitur, defendi supplices. Sic Demophon ad legatum Eurystheos:

Eurip. *Herac.* v. 252.

> Si crimen istis aliquod hospitibus struis,
> Jus impetrabis: vi quidem hinc non abstrahes.

Et in altera tragœdia Theseus ad Creontem:

> Es facinus ausus [8] temet indignum, Creo,
> Tuisque Thebis ac tuis majoribus:
> Ingressus urbem quæ colit fas ac pium,
> Quæ cuncta rite legis ex norma facit,
> Nostris omissis moribus, quicquid lubet
> Moliris, et vi cuncta te acturum putas.
> Adeone hominibus vidua vel patiens jugi
> Urbs ista visa est, et ego nullius rei?
> Non te ista docuit civitas Amphionis,
> Quippe educare haud solita mortales feros:
> Nec approbabit illa cum te audiverit
> Quæ sunt Deorum, quæque mea pervadere,
> Et rapere ab alma sede miseros supplices
> Ego Labdacea si urbe posuissem pedem,
> Quamvis fuissent justa mihi certissima,
> Indubia, nulli injicere tentassem manum,
> Nisi annuente qui soli regnum tenet,

[8] Est in Græco ἐμοῦ, apud SOPHOCLEM, *Œdip. Colon.* vers. 904 [[v. 911 *Ed. Dindorf.*]] In *Excerptis ex Trag. et Comœd. Græc.* habet etiam *te*, nescio quo fato, quum ibi recte scripserit ἐμοῦ, pag. 98, 99. *J.B.*

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defended [on condition of desisting from their evil practices, G.] so far as punishment goes; because it is the interest of the human race, that if they cannot be reformed in any other way, they may be so by the assurance of impunity for the past; and any people or any ruler may negotiate such a matter.

VI. 1 It is to be remarked that it sometimes happens that suppliants are defended [provisorily], till their case can be fairly judged. So Demophon says to the messenger of Eurystheus, that if he has any charge against the refugees, he will obtain justice, but that till then, they will not be given up. And in another tragedy [the *Œdipus Coloneus* of Sophocles, v. 904]. Theseus says to Creon that it is against the practice of Athens to give up refugees. Your attempt, he says,

Quid in urbe deceat hospitem externa memor.
Tu nec merentem patriam aspergis tuam
Probro atque maculis, et senem certe tua
Te fecit ætas, sed parum mentis potem.

2 Quod si id, cujus accusantur supplices, non sit vetitum jure naturæ aut gentium, res dijudicanda erit ex jure civili populi unde veniunt: quod optime ostendit Æschylus *Supplicibus*, ubi rex Argivus Danaidum gregem ex Ægypto venientem sic affatur: p. 321. [[v. 337, *sqq.*]]

Εἴ τοι κρατοῦσι παῖδες Αἰγύπτου σέθεν,
Νόμῳ πόλεως φάσκοντες ἐγγύτατα γένους
Εἶναι, τίς ἂν τοῖσδ' ἀντιωθῆναι θέλοι;
Δεῖ τοί σε φεύγειν κατὰ νόμους τοὺς οἴκοθεν;
Ὡς οὐκ ἔχουσι κῦρος οὐδὲν ἀμφὶ σοῦ.

Manum tibi si immittat Ægypti genus,
Quod lege patria proximos se sanguine
Dicant, quis hæc objicere se contra velit?
Quare tuum est docere natalis soli
Ex lege, nullo jure te illis subjici.

VII. 1 Vidimus quomodo a subditis, aut veteribus aut advenis, culpa in rectores transeat: vicissim a summa potestate in subditos culpa transibit, si in crimen subditi consenserint, aut si quid fecerint summæ potestatis imperio aut suasu, quod facere sine facinore non poterant: qua de re rectius erit infra agere, ubi, quæ partes sint subditorum, examinabitur. Etiam inter universos et singulos communicatur delictum, quia, ut Augustinus ait loco supra adducto, *ubi universi, ibi et singuli; universi non possunt nisi ex singulis quibus-* *In Levit. Quæst.* 26.

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is an act unworthy of Thebes and of you*.

2 And then, if that of which the refugees are accused is not a matter against the law of nature or of nations, it must be judged by the civil law of the people from whom they come; as Æschylus assumes in his *Suppliants*, where Danaus addresses the persons who came from Egypt to that effect.

VII. 1 We have seen how the fault passes to the rulers from the subjects, either ancient or recently arrived; in like manner the fault will pass from the rulers to the subjects, if these have consented to the crime, or if they have done anything by the command or the suasion of their superiors, which they could not do without guilt: on which point it will be more correct to treat hereafter, when we have to

* In the Greek, ἐμοῦ, but Grotius translates it *te*, both here and in his extracts from the Greek Tragedies and Comedies. J. B.

que constare: nam singuli quique congregati, vel in summam reputati, faciunt universos.

2 Pertinet autem culpa ad singulos qui consenserunt, non ad eos qui aliorum sententiis victi sunt. Distinctæ enim sunt pœnæ singulorum et universitatis. Sicut singulorum pœna interdum est mors, ita πόλεως θάνατος ἀνάστατον γενέσθαι, *mors civitatis everti:* quod fit cum corpus civile dissolvitur; qua de re diximus alibi. Atque hoc modo si civitas esse desinat, usumfructum velut morte finiri recte dixit Modestinus. Singuli in servitutem pœnæ nomine rediguntur, ut Thebani sub Alexandro Macedone: exceptis his qui decreto exuendæ societatis contradixerant. Sic et civitas subit servitutem civilem in provinciam redacta. Singuli bona sua amittunt confiscatione. Sic civitati adimi solent quæ habet communia, muri, navalia, naves bellicæ, arma, elephanti, ærarium, agri publici.

Lycur. *orat.* p. 139.

Supra c. 9, § 4.

L. 21. *D. quib. mod. ususfr. am.* Plut. *Alex.* 670 D.

3 At ut singuli ob delictum universitatis citra consensum suum ea amittant, quæ ipsorum sunt propria, injustum est, ut recte ostendit Libanius in ea quæ est de seditione Antiochena.

[h] *Theodosii probat factum*] Eadem quæ Libanius de hac re dicit et Chrysostomus in XVII. *de Statuis:* in eosdem Antiochenos paria olim constituerat Marcus Antoninus philosophus, ut testis est Capitolinus (cap. 25) et in By-

speak of the duties of subjects. There is even a participation of punishment by communication between the general body and individuals; for, as Augustine says, *The general body consists of individuals,* &c.

2 But the fault lies at the door of the individuals who have consented to the act, not to those who were outvoted by the others. For the punishments of individuals and of the general body are different. As the punishment of individuals is sometimes death, so it is the punishment of a city to be destroyed, which is done when the civil body is dissolved; of which case we have spoken elsewhere. And if a city or state cease to exist in this manner, Modestinus rightly said, that the life-interest which any persons have in it ceases. Individuals are reduced to slavery in the way of punishment, as the Thebans under Alexander of Macedon: excepting those who had voted against the proposal of making the alliance [with the Macedonians, G.] So also a city or state undergoes civil slavery, by being reduced into the condition of a province. Individuals lose their goods by confiscation. But [in punishing a city] the things which are taken from the city are the public property; as walls, arsenals, fleets, arms, elephants, its treasury, and its public lands.

3 But that individuals should lose what is their own property, on

Idem [h] Theodosii probat factum, qui commune delictum punierat interdictione theatri, balneorum, nominis metropolitani.

VIII. 1 Egregia hic occurrit quæstio, an pœna ob delictum universitatis semper exigi possit. Quamdiu durat universitas, videtur posse, quia idem corpus manet, quanquam particulis succedentibus, ut alibi ostensum est. Sed ex adverso notandum est, quædam de universitate dici primo ac per se, ut habere ærarium, leges, et similia: quædam non nisi derivatione a singulis. Sic namque doctam dicimus universitatem et fortem, quæ plurimos habet tales. De hoc genere est meritum: primo enim convenit singulis, ut animum habentibus quem universitas per se non habet. Extinctis ergo illis per quod ad universitatem meritum deducebatur, ipsum quoque meritum extinguitur, ac proinde et pœnæ debitum, quod sine merito diximus non consistere. Libanius in dicta oratione: ἐμοὶ μὲν γὰρ δοκεῖς ἀρκεῖν ἡγούμενος τὸ μηκέτ' εἶναι μηδένα τῶν ταῦτ' ἠδικηκότων· *ita enim ex-*

Arist. vii. *Pol.* 13.

zantinos Severus, demto theatro, thermis, honore, ornamentisque omnibus: sed et ipsa urbs Perinthiis data: vide Herodianum (Lib. III. c. 6. n. 19. *Edit. Bœcler.*) Zonaram, (Lib. XII. cap. 8) et quæ supra dicta a nobis.

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account of a delict of the general body, committed without their consent, is unjust: as Libanius rightly shews on the sedition of Antioch. The same writer approves an act of Theodosius, who punished a public offense by interdicting the theatre, the public baths, and the title of *metropolis.*

VIII. 1 This important question occurs, whether punishment may always be exacted for the delicts of the general body. So long as the constitution of the body continues, it would seem that it can, because the same body remains, though preserved by a succession of different particles, as we have elsewhere shewn. But, on the contrary side, it is to be observed that some things are asserted of the body primarily and *per se,* as to have a treasury, laws, and the like; others only derivatively from its members. Thus we call a body learned and brave, which has many learned and brave members. And desert [of punishment, G.] is of this kind; for, in the first place, it belongs to individuals, as having a spirit and intelligence which the body by itself has not. Therefore if these persons be extinct, from whom desert was deduced and carried to the account of the body, the desert is extinct, and also the desert of punishment; which, as we have said, cannot exist without desert. So Libanius says: *It must suffice you as to punishment, that no one is left of those who offended.*

istimo, sufficere tibi, ad pœnam quod nemo supersit eorum qui deliquerunt.

2 Probanda igitur Arriani sententia damnantis vindictam [9][1]Alexandri in Persas, cum pridem interiissent qui in Græcos peccaverant. De excidio Branchidarum facto per eundem
Lib. vii. 5. Alexandrum hoc est Curtii judicium: *Quæ si in ipsos proditionis auctores excogitata essent, justa ultio esse, non crudelitas, videretur. Nunc culpam majorum posteri luere, qui ne viderant quidem Miletum, adeo Xerxi non potuerant*
Lib. iii. 18. *prodere.* Simile est alio loco Arriani judicium de Persepoli incensa, in ultionem eorum quæ Athenis Persæ fecerant: *ἀλλ' οὐδ' ἐμοὶ δοκεῖ σὺν νῷ δράσαι τοῦτό γε Ἀλέξανδρον, οὐδὲ εἶναί τις αὕτη Περσῶν τῶν πάλαι τιμωρία· at mihi non videtur hoc prudenter fecisse Alexander, neque vero hæc vera est vindicta in eos Persas qui pridem esse desierant.*

Plut. *Apoph.* p. 176 D. *et de sera num. vindict.* p. 557 B. 3 Nam Agathoclis illud nemo non ridet, qui ad Ithacen-

[9] Non damnat hanc vindictam Arrianus, Lib. II. cap. 14. ubi inducit Alexandrum veteres illas injurias Persarum memorantem. Ex memoriæ vitio confudit Auctor Arriani judicium de Persepoli incensa, quod paullo post subjecit, et a prima Editione aberat. *J. B.*

[1] *Alexandri in Persas*] Propterea aliam ei bello causam attribuit Julianus in Constantii laudatione: *καὶ ὅτι μὲν οὐδείς πω πόλεμος συνέστη πρότερον, οὐδ' ἐπὶ Τροίαν τοῖς Ἕλλησιν, οὐδ' ἐπὶ τοὺς Πέρσας Μακεδόσιν, οἵπερ δὴ δοκοῦσιν ἐν δίκῃ γενέσθαι, τοσαύτην ἔχων ὑπόθεσιν καὶ παιδί που δῆλον. οὐ τῆς μένγε λίαν ἀρχαίων ἀδικημάτων τιμωρίας σφόδρα νεωτέρας, οὔτ' εἰς παῖδας οὔτ' εἰς ἐκγόνους γενομένης, ἀλλ' εἰς τὸν ἀφελόμενον καὶ ἀποστερήσαντα τὴν ἀρχὴν τοὺς τῶν εὐδοκησάντων* (male legitur *ἀδικησάντων*) *ἀπογόνους· nullum unquam bellum, quod quidem justum cen-*

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2 We must therefore approve the opinion of Arrian, when he condemns* the revenge of Alexander upon the Persians, since those who had wronged the Greeks were long ago dead. Concerning the destruction of the Branchidæ by the same Alexander, the judgment of Curtius is similar, *that it was not justice, but cruelty, to punish those who could not betray Xerxes, and had never seen Miletus.* And of the same kind is the judgment of Arrian respecting the burning of Persepolis, that there was no true punishment in it, since the offending Persians had long ceased to be.

3 Every one sees the absurdity of Agathocles' answer to the complaints of the Ithacans, of damage done by the Sicilians; that the Sicilians had received more damage from Ulysses. And Plutarch, in his book against Herodotus, says, that it is very unlikely that the Corinthians

* Arrian, Lib. II. c. 14, does not condemn this plea of Alexander: the author was thinking of Arrian's judgment on the burning of Persepolis, which occurs immediately after in the text, but was not mentioned in the first edition. J. B.

sium querelas de damnis illatis respondit, plus mali Siculos ab Ulyxe olim pertulisse. Et Plutarchus libro contra Herodotum, minime ait vero esse simile, Corinthios ulcisci voluisse acceptam a Samiis injuriam μετὰ τρεῖς γενεὰς, *post tres hominum ætates*. Nec procedit hujus et similium factorum defensio, quam apud Plutarchum legere est *De sera numinis vindicta*. Aliud enim est jus Dei, aliud hominum, ut mox apertius fiet. Neque si æquum est posteros honores et præmia accipere ob merita majorum, ideo et puniri eos ob eorum peccata æquum est. Beneficii enim talis est materia, ut in quemvis conferri sine injuria possit; pœnæ non item. Pag. 860.

IX. Diximus de modis per quos communitas pœnæ accidit ex culpæ communitate. Restat spectemus an et, culpa non communicata, communicetur pœna: quæ res ut recte intelligatur, et ne, quæ re ipsa diversa sunt, ob vocum similitudinem confundantur, monenda sunt quædam.

X. 1 Primum, aliud esse damnum directe datum, aliud

seretur, tali ex causa gestum, non a Græcis in Trojanos, non a Macedonibus in Persas, vel puero liqueat: non enim illi obsita vetustate crimina seris pœnis, ne in nepotes quidem aut liberos, persequebantur, sed illos impetebant, qui virorum bene meritorum posteris vim inferebant, regna extorquebant. [Locus est, pag. 95 B. Edit. Illustris Spanhemii: sed vertendum erat in posterioribus verbis: *Non enim ille* (scilicet Constantius) *obsita vetustate crimina seris pœnis, etiam in filios aut nepotes, persequebatur; verum eum impetebat* (i. e. Magnentium) *qui posteris virorum bene meritorum Imperium vi cripuerat.* Unde patet, Julianum laudi tribuere Constantio, quod non imitatus sit veteres Græcos, aut Alexandrum: adeoque non aliam bello Alexandri in Persas caussam adtribuere, sed potius aliam non fuisse innuere. *J. B.*]

should have wished to avenge an injury received from the Samians after three generations. Nor is the defense of such cases satisfactory, which we find in Plutarch *On the delayed punishments of the gods.* For the justice administered by God is one thing, that by men, another, as we shall shew hereafter. Nor again can we argue that, because descendants receive honours and rewards for the merit of their ancestors, therefore it is just that they should be punished for their crimes. For benefits are of such nature, by their matter, that they may be bestowed upon any without injury, but punishments are not.

IX. We have spoken of the ways in which a participation in the punishment takes place in consequence of a participation in the crime. It remains that we consider whether, when there is not a participation in the offense, there may be in the punishment; and here, that we may not be misled by the similarity of words when the things are different, we must make a few remarks.

X. 1 First, that a damage directly caused is one thing, and

quod in consequentiam venit. Directe datum voco, quo cuiquam aufertur ad quod jus proprium habet. Per consequentiam, quo fit, ut quis non habeat quod habiturus alioqui fuisset, cessante scilicet conditione, sine qua jus non habebat.

L. 24. § f. d. dam. inf. Exemplum est apud Ulpianum: si in meo puteum aperui quo factum est ut venæ ad te perventuræ præciderentur: negat operis mei vitio damnum datum in ea re, in qua jure meo *L. 26. d. t.* usus sum. Et alibi, multum ait interesse, utrum damnum quis faciat, an lucro quod adhuc faciebat uti prohibeatur. Et *L. 63. D. ad L. Falc. princ.* Paulus jurisconsultus, *præposterum esse* ait, *ante nos locupletes dici quam acquisierimus.*

2 Sic parentum bonis confiscatis sentiunt quidem incommodum liberi, sed proprie ea pœna non est, quia bona illa illorum futura non erant, nisi a parentibus ad ultimum spiritum essent conservata. Quod recte ab Alpheno notatum est, *L. 3. D. de interdict. et releg.* cum ait patris pœna amittere liberos id quod ab ipso perventurum esset ad eos: quæ vero non a patre, sed a rerum natura aut aliunde tribuerentur, ea manere incolumia. Sic *Epist. ad Brut. L. ii. Ep. 12 et 15.* Themistoclis liberos eguisse scribit Cicero, nec iniquum putat, ut eandem calamitatem ferant liberi Lepidi. Idque ait anti-

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a damage caused by consequence, another. I call that a damage directly caused, by which any one is deprived of a proper right which he has; a damage by consequence, that by which any one has not that which he would have had: namely, by the cessation of the condition, without which his right cannot subsist. We have an example in Ulpian: If in my ground I have opened a well, by which the springs which would have come to you are cut off: he denies that, by the effect of my operations, a wrongful damage is done to you, since I was using my own right in my own property. And in another place, he says it makes a great difference, whether any one suffer a loss, or be prevented in a gain which he was going on to enjoy. And so Paulus says, that it is preposterous that we should be supposed to have possessions before we have acquired them.

2 So when the goods of the parents are confiscated, the children feel the loss; but that is not properly a punishment, because those goods were not to become theirs, except their parents kept possession of them till their last breath. Which is rightly noted by Alphenus, when he says that by the punishment of the parent, the children lose that which from him would have come to them; but that which was given them by the nature of things, or from any other source, they do not lose. So Cicero says, that the children of Themistocles were in absolute want, and he does not think it unjust that the children of

quum esse et omnium civitatum; cui tamen mori leges posteriores Romanæ multum temperamenti adjecerunt. Sic cum ex delicto majoris partis, quæ, ut alibi diximus, personam universitatis sustinet, universitas in culpa est, eoque nomine amittit ea quæ diximus, libertatem civilem, muros, et alia commoda, sentiunt damnum et singuli innocentes; sed ea in re, quæ ad ipsos non pertinebat nisi per universitatem. *L. 7. D. de bon. damn. ubi vid. Int.*

XI. 1 Præterea notandum, interdum imponi alicui aliquid mali, aut boni aliquid auferri, occasione quidem alicujus peccati alieni, sed non ita ut id peccatum causa sit proxima ejus actionis, quod jus ipsum agendi attinet. Sic qui occasione alieni debiti aliquid promisit, malum patitur, ex veteri verbo, *ἐγγύα, παρὰ δ' ἄτα· sponde, noxa præsto est:* at proxima causa obligationis est ipsa promissio. Nam ut qui pro emtore fidejussit, non proprie ex emto tenetur, sed ex promisso: ita et qui pro delinquente, non ex delicto, sed ex sua sponsione. Atque hinc fit quod malum illi ferendum mensuram accipit non ex delicto alterius, sed ex potestate quam ipse in promittendo habuit.

2 Cui consequens est, ut ex sententia, quam veriorem

Lepidus should bear the same lot. And this, he says, was the ancient custom, and common to all cities; though this custom was much limited and tempered by the later laws of Rome. So when by the delict of the general body, which, as we have said, stands for the whole body, the whole body is in fault, and on that ground loses, as we have said, civil liberty, city walls, and other advantages, innocent individuals also feel the inconveniences; but they feel it in those things which only belonged to them through the general body.

XI. 1 It is further to be remarked, that sometimes a person has harm imposed upon him, or loses good, by the occasion indeed of another's fault, yet not so that the fault is the proximate cause of the action, so far as pertains to the right of acting. Thus he who has promised something on occasion of another's debt, suffers damage, as the old proverb says, *Suretyship is next door to mischief;* but the proximate cause of the obligation is his promise. For as he who is surety for a buyer, is not properly bound by the sale, but by his promise; so he who is bound for a delinquent, is not bound by the delict, but by his own engagement. And hence the loss which he has to bear is measured, not by the other's delict, but by the power which he had in promising.

2 From which it follows, that according to the opinion which we hold for the sounder, no body can be put to death in virtue of suretyship; because we hold that no one has such right over his own life,

credimus, occidi nemo possit ex fidejussione, quia statuimus neminem jus tale habere in vitam, ut eam sibi ipse adimere, aut adimendam obligare possit: cum veteres Romani Græcique aliter ea de re senserint: ideoque et [k] vades capitali judicio crediderint obligari, ut in Ausonii est versu, et ex notissima Damonis et Pythiæ historia apparet: et obsides sæpe capite plexerint, [l] ut alibi memorabimus. Quod de vita diximus, idem et de membris intelligi debet: nam et in illa jus homini datum non est, nisi corporis servandi causa.

3 Quod si exilium, si pecuniarum damnum in promissione fuerit, et alterius delicto impleta sit conditio, damnum feret fidejussor, quæ tamen in ipso, si exacte loquimur, pœna non erit. Simile quid occurrit in eo jure quod quis habet sic ut ab alterius voluntate pendeat, quale est jus precarii,

[k] *Vades capitali judicio crediderint obligari*] Apertum id in verbis Rubenis ad patrem Jacobum Gen. xlii. 37. et apud Josephum II. *Antiquæ Historiæ*, cap. vi. § 5. *Edit. Hudson.* Hos vades *ἀντιψύχους* animæ vicarios vocat Eutropius Caligula; *ἐγγυητὰς θανάτου*, mortis sponsores, Diodorus Siculus, in excerptis Peirescianis, [ubi de Damone: *ἔγγυος εὐθὺς ἐγενήθη θανάτου.*] Chrysostomus ad Galatas II. *καθάπερ τινὸς καταδικασθέντος ἀποθανεῖν, ἕτερος ἀνεύθυνος ἑλόμενος θανεῖν ὑπὲρ ἐκείνου ἐξαρπάζει τῆς τιμωρίας αὐτόν· sicut homine aliquo ad mortem damnato, innocens alter pro illo se morti devovens illum supplicio liberat.* [In cap. iii. 13. Tom. III. pag. 740. *Ed. Savil.*] Augustinus Epistola LIV. ad Macedonium: *et aliquando qui causa fuit mortis potius in culpa est, quam ille qui occidit: velut si quispiam decipiat fidejussorem suum, atque ille pro isto legitimum supplicium luat.* [Mirum heic ab Auctore

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that he can himself take it from himself, or bind himself to have it taken: though the ancient Romans and Greeks thought otherwise on this point: and therefore held sureties to be bound to undergo capital punishment for their principal, as it is in the verse of Ausonius: [*Who takes death as a substitute for another? The Surety. Quis subit in pœnam capitali judicio? Vas.* Gronov.], and as appears in the well known story of Damon and Pythias*: and hostages have often been put to death, as we have elsewhere stated. What we have said of life, may also be said of limb: for man has no right to sacrifice that, except for the sake of preserving the whole body.

3 But if the promise included the expatriation of the promiser, or the payment of a sum of money, and the condition be not fulfilled by the fault of another, the person who gives such security must bear the loss; which, however, properly speaking, is not a punishment. Something similar occurs in any right which a person has in such a way that it depends on the will of another; such as a right granted to be held during the pleasure of the grantor, and even the right of pri-

* The right name is Phintias, Cic. *Off.* III. 10. *Gronov.*

respectu habito ad rei dominium; et jus privatorum, respectu habito ad eminens dominium, quod utilitatis publicæ causa civitas habet. Nam si quid tale alicui auferatur occasione delicti alieni, pœna in illis proprie non est, sed executio juris antecedentis, quod erat penes auferentem. Sic quia in bestias proprie delictum non cadit, ubi bestia occiditur, [m]ut lege Mosis ob concubitum cum homine, non ea vere pœna est, sed usus dominii humani in bestiam. *Levit.* xviii. 23; xx. 15, 16.

XII. His distinctionibus positis, dicemus, neminem delicti immunem, ob delictum alienum, puniri posse. Cujus rei ratio vera non est ea, quam adfert Paulus jurisconsultus, quod pœnæ constituantur in emendationem hominum: nam exemplum videtur statui posse etiam extra personam delinquentis, in ea tamen persona quæ ipsum tangat, ut mox dicemus; sed quia obligatio ad pœnam ex merito oritur: meritum autem *L.* 20. *D. de Pœn.*

Eutropium, Scriptorem Latinum, testem adferri vocis Græcæ Ἀντίψυχοι de Vadibus usurpatæ. Neque vocem illam reperiri putes in Versione Græca Pæanii. Sed Auctor noster, dum festinaret, nec satis adtenderet, scripsit Eutropium, pro DIONE CASSIO: hic enim, ubi loquitur de Publio Afranio Potito, et Atanio Secundo, qui Caligula ægrotante juraverant sese mortem sponte quæsituros, si ille fato fungeretur, ita ait, ἤλπιζον παρ' αὐτοῦ, ὡς καὶ ΑΝΤΙΨΥΧΟΙ οἱ ἀποθανεῖν ἠθελήσαντες, &c. Lib. LIX. pag. 741 B. *Ed. H. Steph.* Ceterum de re ipsa, ut et de voce, vide SALMASIUM in Spartian. Hadrian. c. 14. et Clariss. CLERICUM, in Matth. xx. 23. post Hammondi Adnotat. *J. B.*]

[l] *Ut alibi memorabimus*] Libro III. cap. iv. § 14.

[m] *Ut lege Mosis*] De qua vide Maimonidem *Ductore Dubitantium* III. 40.

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vate property, which is liable to be interfered with by the *dominium eminens*, which the state has for public purposes. If any thing of this kind is taken away from any one on account of the fault of another, it is not properly a punishment, but the execution of a pre-existing right, which was in the hands of him who takes the precarious right away. And inasmuch as brutes are not capable of punishment, when a beast is put to death, as in the case provided for in the law of Moses, this is not really punishment, but the exercise of human dominion over the beast.

XII. Having premised these distinctions, we say that no one innocent of delict can be punished for the delict of another. But the true reason of this, is not that which is given by Paulus, that punishment is instituted for the amendment of men: for it would seem that an example may be made even extraneously to a man's own person, in a person whose welfare affects him, as we shall soon have to shew: but because liability to punishment arises from desert: and desert is a personal quality, since it must have its origin in the will, than which nothing is more peculiarly ours: it is, as we may say, *self-causing*.

est personale, quippe ex voluntate ortum habens, qua nihil est magis nobis proprium, unde *αὐτεξούσιον* vocatur.

Epist. 3. *de morte Nepot.* p. 23 A. Tom. I. *Epist.* 105. (aut potius 106, ubi tamen verba non eadem.) *Immo* Jovis. p. 667 D.

XIII. 1 *Neque virtutes, neque vitia parentum,* inquit Hieronymus, *liberis imputantur.* Augustinus vero, *Deus,* ait, *ipse foret injustus, si quenquam damnaret innoxium.* Dion Chrysostomus oratione ultima, cum sanctione Atheniensium adjecta Solonis legibus devoveri posteros dixisset, de Dei lege hæc subjicit: πλὴν παῖδας καὶ γένος οὐκ ἐπέξεισιν, ὡς ἐκεῖ, τῶν ἁμαρτανόντων· ἀλλ' ἕκαστος αὐτῷ γίνεται τῆς ἀτυχίας αἴτιος· *verum hæc non, ut illa, liberos et posteros peccantium punit: sed sibi quisque fit infortunii causa.* Et huc illud vulgatum pertinet: *noxa caput sequitur. Sancimus,* aiunt Imperatores Christiani, *ibi esse pœnam, ubi et noxa est.* Deinde: *peccata igitur suos teneant auctores: nec ulterius progrediatur metus, quam reperiatur delictum.*

L. Sancimus, 22. *C. de pœnis.*

Lib. ii. *de leg. spec.* p. 802 E.

2 Justum est, [n] ait Philo, eorum esse pœnas quorum sunt peccata; reprehendens morem quarundam gentium quæ ty-

[n] *Ait Philo*] Idem libro *de Pietate*, [Immo *de Nobilitate*, pag. 910. in fin. Confudit Auctor, lapsu memoriæ, εὐσέβειαν cum εὐγενείᾳ.] ἧς οὐκ ἂν οἶδ' εἴτις βλαβερωτέρα γένοιτ' ἂν εἰσήγησις, εἰ μήτε τοῖς ἐξ ἀγαθῶν πονηρευομένοις ἐπακολουθήσει τιμωρὸς δίκη, οὔτε τοῖς ἐκ πονηρῶν ἀγαθοῖς ἔρχεται τιμὴ, τοῦ νόμου δικάζοντος ἕκαστον αὐτὸν ἐφ' ἑαυτοῦ μὴ συγγενῶν ἀρεταῖς ἐπαινοῦντος ἢ (addendum hic κακίαις) κολάζοντος· *haud scio an possit ullum pejus induci institutum, quam si nec malos e bonis genitos sequetur pœna, nec honos habebitur bonis qui ex malis parentibus nati sunt. Aliter lex quæ de suis actionibus quemque judicat, non ex cognatorum virtutibus laudat, aut ex eorundem vitiis punit.* Josephus (*Ant. Jud.* XIII. cap. xiv. § 2. secundum divis. Hudson.) contrarium factum in rege Judæorum Alexandro vocat ὑπὲρ ἄνθρωπον δίκην,

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XIII. 1 *Neither the virtues nor the vices of parents,* says Jerome, *are imputed to the children:* and Augustine, *God would be unjust if he condemned an innocent person.* Dio Chrysostom says of the law of God, speaking on the occasion of Solon's law, by which the children were stigmatised; *this law does not, like that, punish the children of criminals; in this, every one is his own cause of suffering.* And hence the rule, *Noxa caput sequitur, Punishment is personal.* So the Christian Emperors direct.

2 It is just, says Philo, that those should have the penalty who had the sin: reprehending the manner of some nations which punished with death the children of traitors or tyrants. The same custom is blamed* also by Dionysius, who shews that the reason sometimes

* No, says Barbeyrac: Dionysius leaves the matter undecided. See the place, Lib. VIII. c. 80.

rannorum aut proditorum insontes liberos morte puniebant. Quem reprehendit [1]et Dionysius Halicarnassensis, ostenditque iniquam esse rationem quæ obtenditur, quod parentibus similes futuri putantur, cum id incertum sit, nec incertus metus ad mortem cujusquam sufficere debeat. Nescio quis Christiano Imperatori Arcadio ausus est hoc dictare, debuisse paterno perire supplicio, in quibus paterni criminis exempla metuuntur: et Ammianus narrat interemtam sobolem, parvam etiam tum, *ne ad parentum exempla succresceret.* Nec magis justa causa metus ultionis, unde natum est Græcum proverbium:

L. 5. § 1. C. ad L. Jul. maj.

Lib. xxviii. c. 2. in fin.

Vict. de Jure Belli n. 33.

Desipit occidens patrem qui pignora servat.

3 At Seneca: *nihil est iniquius quam aliquem heredem paterni odii fieri.* Attagini, qui Thebanis ad Medos deficiendi auctor fuerat, liberos nullo malo affecit Pausanias Græcorum Imperator, *φὰς τοῦ Μηδισμοῦ παῖδας οὐδὲν εἶναι μεταιτίους· dicens illos extra culpam esse partium Medicarum.* Marcus Antoninus in epistola ad Senatum: [o]*quare*

Sen. Lib. ii. de Ira, c. 34.

Herod. ix. 87.

exactionem pœnæ quæ humanum excedit modum. Ovidius:

Illic immeritam maternæ pendere linguæ
Andromedam pœnas injustus jusserat Ammon.

(*Metam.* Lib. IV. vers. 668.)

[1] Minime reprehendit, sed in medio relinquit, utrum mos ille sit justus, an injustus. Inspice locum, Lib. VIII. c. 80. *J. B.*

[o] *Quare filiis Avidii Cassii*] Vide Vulcatium vita Avidii, (cap. 12.) Laudat parem Constantii humanitatem Julianus: (*Orat.* II. p. 100, 101. *Ed. Spanh.*) ostenditque sæpe ex malis parentibus bonos venisse liberos, sicut e saxis apes evolant, e ligno amaro nascuntur ficus, e spinis prodit pomum Punicum. Ejusdem hæc sunt: ἀλλὰ καὶ τὸν παῖδα τοῦ τετελευτηκότος [τετολμηκότος habent Edd.] νήπιον κομιδῇ τῆς πατρῴας οὐδὲν εἴασας μετασχεῖν ζημίας.

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given is fallacious, that the children will probably be like their parents; since that is uncertain, and an uncertain fear ought not to cause any one's death. Some Christian did venture to advise the emperor Arcadius, that these ought to suffer the same punishment as their parents, in whom the repetition of their parents' crime was feared: and Ammianus relates that a family was put to death, even at an early age, *that they might not grow up to be like their parents.* Nor is fear of revenge a more just cause of such proceeding, notwithstanding the Greek proverb, *Who kills the sire and spares the son is mad.*

3 Seneca on the other hand says, Nothing is more unjust than to make a man the heir of his father's odium. When Attagines was the means of the Thebans deserting to the Medes, Pausanias did not harm his children: *they had had nothing to do with Medizing,* he said. M. Antoninus, in an epistle to the senate, wrote, *You will pardon the wife*

filiis Avidii Cassii (is in eum conjuraverat) *et genero et uxori veniam dabitis. Et quid dico veniam, cum illi nihil fecerint?*

Exod. xx. 5. XIV. 1 Deus quidem in lege Hebræis data paternam impietatem in posteros se vindicaturum minatur: sed ipse jus dominii plenissimum habet, ut in res nostras, ita in vitam nostram, ut munus suum, quod sine ulla causa et quovis tempore auferre cuivis quando vult potest. Igitur si morte immatura ac violenta rapit liberos Acanis, Saulis, Jeroboami, Achabi, [p]in ipsos jure dominii, non pœnæ, utitur, sed eodem facto gravius punit parentes. Nam sive superstites sunt, quod maxime spectavit lex divina, atque ideo lex minas istas [q]ultra abnepotes non extendit, Exod. xx. 5, quia ad eorum conspectum pertingere potest humana ætas: certum est parentes puniri tali spectaculo: gravius enim id illis quam quod ipsi ferunt: ut a Chrysostomo recte dicitur, quicum consentit Plutarchus, *οὐ λυποῦσα μᾶλλον ἑτέρα κόλασις ἢ τοὺς ἐξ ἑαυτῶν κακὰ πάσχοντας δι' αὐτοὺς ὁρᾷν· nullum durius supplicium, quam eos qui ex se sunt ob se miseros*

Jos. vii. 24. 2 *Sam.* xxi. 1 *Reg.* xiv. 2 *Reg.* viii. 19, 20.

Homil. 29. *in* 9. *Gen.* Tom. I. p. 231. *De sera Num. vind.* p. 561 A.

οὕτω σοι πρὸς ἐπιείκειαν ἡ πρᾶξις ῥέπουσα τελείας ἀρετῆς ὑπάρχει γνώρισμα· etiam mortui filium infantem admodum non sivisti pœna paterna implicari; ita tua agendi ratio ad lenitatem semper vergens perfectæ virtutis est testimonium. (*Orat.* I. in fin. pag. 49 A.)

p *In ipsos jure dominii non pœnæ utitur*] Hæc est sententia Rabbini Simeonis Barsema, longe verissima.

q *Ultra abnepotes non extendit*] Exempla habes in Zimri et Jehu.

r *Ut vel posteritatibus suis prospicientes legi divinæ obedirent*] Alexander apud Curtium libro VIII. *Non oportebat vos scire quid de his statuissem, quo*

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and the son-in-law of Avidius Cassius (who had conspired against him). *But why do I say pardon, when they have committed no offense?*

XIV. 1 God indeed, in the law which he gave the Hebrews, threatens that he will visit the impiety of the fathers upon their posterity. But God has the most plenary right of dominion, as over our goods, so over our lives, as his gift; which he may take away from any one, whenever he will, and without any cause. If, therefore, he takes away, by an untimely and violent death, the children of Achan, Saul, Jeroboam, Ahab, he uses towards them his right of dominion, not of punishment; but by the act, he more grievously punishes the parents. For if they outlive their children, which is the case that the divine law principally regards; (and therefore the law does not extend its threatenings beyond great grandchildren, Exod. xx. 5: because the common age of man allows him to see them;) it is certain that then they are punished by such a spectacle; for that is

spectare: sive non eousque provivunt, tamen cum eo metu occidere magnum est supplicium. *Duritia populi,* inquit Tertullianus, *ad talia remedia compulerat,* [r] *ut vel posteritatibus suis prospicientes legi divinæ obedirent.* Adv. Marc. ii. 15.

2 Sed simul notandum est, hac graviore vindicta non uti Deum, nisi adversus scelera proprie in suam contumeliam perpetrata, ut falsos cultus, perjurium, sacrilegia. Nec aliter Græci existimarunt: nam quæ crimina credita sunt posteritatem obstringere, [s] quæ ἄγη ipsi vocant, omnia istius sunt generis: quo de argumento facunde disserit Plutarchus, libro de sera Numinis vindicta. Exstat [t] apud Ælianum oraculum tale Delphicum:

> At scelerum fontes divinum persequitur jus,
> Nec pote vitari; non si genus ab Jove ducant:
> Sed capiti ipsorum quique enascuntur ab ipsis
> Imminet; inque domo cladem subit altera clades.

[u] Agebatur autem ibi de sacrilegio: quod et historia comprobat auri Tholosani apud Strabonem et Gellium. De perjurio similes sententias supra adduximus. Deinde vero, etsi id comminatus Lib. iv. p.188. Lib. iii. 9.

tristiores perirctis. (Cap. 8.)

[s] *Quæ ἄγη ipsi vocant*] Vide Plutarchum *Pericle:* (Tom. I. pag. 170 A.) et quæ supra dicta hoc libro c. xiii. § 1.

[t] *Apud Ælianum*] Libro III. 43.

[u] *Agebatur autem ibi de sacrilegio*] Ut et Libanius: *ὧν οἱ μὲν ἔδοσαν ἤδη δίκην, οἱ δὲ οὔπω μέν. οὐκ ἔστι δὲ ὅτε αὐτοὺς ἐξαιρήσεται. λέγω δὲ αὐτοὺς καὶ παῖδας, λέγω καὶ τοὺς ἐξ ἐκείνων·* *quorum alii jam pœnas dedere, alii nondum quidem, sed nemo eos pœna eximet: nec ipsos tantum dico, sed et liberos et ex iis nascituros.* Similia habet idem Libanius oratione quam edidit Gothofredus.

more grievous to them than what they themselves suffer, as Chrysostom says; or if they do not live so long, still, to die with such a fear hanging over them, is a great punishment. *The people's hardness of heart,* as Tertullian says, *led to such remedies, that they might obey the divine law, even out of regard for their posterity.*

2 But it is to be noted, at the same time, that God does not make use of this heavier kind of punishment, except towards offenses especially tending to his dishonour, as false worship, perjury, sacrilege. Nor did the Greeks judge otherwise; for the crimes which were supposed to entail a curse on posterity, are all of this kind; as Plutarch learnedly shews in his book On the procrastinated anger of the gods. In Elian, we have an oracle which says that the guilty cannot escape, but that vengeance follows them and their posterity. But there, sacrilege was in question, as is proved by the history of the Tholosan gold. We have above adduced similar opinions concerning perjury. Moreover, though God has threatened this, he does not always use his power, especially if

est Deus, non tamen semper eo jure utitur, maxime si [x] insignis
ver. 20. quædam virtus in liberis eluceat, ut videre est Ezech. cap. xviii. et exemplis quibusdam a Plutarcho dicto loco probatur.

3 Et cum in novo federe apertius quam olim declarata sint supplicia, quæ impios post hanc vitam manent, [y] ideo in eo federe nulla exstat comminatio personas peccantium egrediens; quo præcipue, quanquam minus aperte, ut mos est vatibus, spectat dicta jam Ezechielis oratio. Factum autem illud Dei hominibus imitari non licet: neque par ratio est, quia, ut jam diximus, Deus sine culpæ intuitu jus habet in vitam; homines non nisi ex gravi culpa, et quidem quæ personæ sit propria.

Deut. xxiv. 16. 4 Quare eadem illa divina lex, ut parentes pro liberis, ita ob parentum facta liberos mortis pœna affici vetat: quam legem [z] pii reges etiam in perduellibus secuti leguntur: eamque legem

[x] *Insignis quædam virtus*] Et publica paterni criminis detestatio, qualem fecit Andronicus Palæologus Imperator, apud Gregoram libro vi. pag. 81. (*Ed. Colon.* seu *Genev.* 1616.)

[y] *Ideo in eo federe nulla exstat comminatio personas peccantium egrediens*] Tertullianus *de Monogamia: desivit uva acerba a patribus manducata dentes filiorum obstupefacere: unusquisque enim in suo delicto morietur.* (Cap. 7.)

[z] *Pii reges*] Ut Amasias (ii. Reg. xiv. 6.)

[2] Nil de tali lege apud Isocratem, in laudatione Busiridis, ad quam Auctor nos remittit, nec alibi, quod sciam: immo de illa silere video eos, qui ex professo mores et leges Ægyptiorum collegerunt, e. g. Boeclerum, Tom. ii. Dissert. xxiii: Marshamum, in *Canone Chronico*, &c. Occasionem errori dederunt verba ista, *οὐδὲ εἰς τοὺς παῖδας ἀναβληθήσεσθαι τὰς τιμωρίας*, etc. quæ leguntur pag. 226 c. *Ed. H. Steph.* Sed ubi agitur de vindicta divina, quam putabant Ægyptii non differri, ut pos-

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the children turn out eminently virtuous; as see Ezek. xviii., and as Plutarch proves by examples.

3 And since, in the New Testament, the punishments are declared more clearly than before, which await the wicked after this life; therefore in that law there is no threatening of punishment which goes beyond the persons of the offenders: to which especially, though less openly, as the manner of the prophets is, that prophecy of Ezekiel looks. But this fact on the part of God is not to be imitated by men; nor is the reason alike: because, as we have said, God has a right over men's lives without regarding their faults: but men have such a right only on the ground of a graver fault, and one which belongs especially to the person.

4 Wherefore the same divine law, as it forbids parents to be capitally punished for their children, so does it forbid children to be so punished for their parents. And this law pious kings have observed, even with regard to their open enemies; and the rule is greatly praised by Josephus and Philo, as also a similar law of Egypt by Iso-

valde laudant Josephus et Philo, ut et similem Ægyptiam [2]Isocrates, et Romanam [a]Dionysius Halicarnassensis. Platonis est *πατρὸς ὀνείδη καὶ τιμωρίας παίδων οὐδενὶ ξυνέπεσθαι.* Quod Latine ita exprimit Callistratus Jurisconsultus: *crimen vel pœna paterna nullam maculam filio infligere potest.* Addita causa: *namque unusquisque ex suo admisso sorti subjicitur, nec alieni criminis successor constituitur. Ferretne,* inquit Cicero, *ulla civitas latorem istiusmodi legis, ut condemnetur filius aut nepos, si pater aut avus deliquissent?* Hinc factum ut [b]prægnantem mulierem mortis supplicio afficere nefas habitum sit [3]Ægyptiorum, [4]Græcorum, et [c]Romanorum legibus.

Lib. iv. 8. §39. *De Leg. Spec.* ii. p. 801, *et seqq.* *Busiride.* *De Leg.* ix. p. 856 D. Tom. II. L. 26. D. *De Pœnis.* Lib. iii. *de nat. Deor.* c. 38.

XV. Quod si injustæ leges humanæ, quæ liberos occidunt ob parentum delicta, injustior sane lex Persarum et Macedo-

Dan. vi. 24. Just. x. 2.

teri demum illam experirentur. *J. B.*

[a] *Dionysius Halicarnassensis*] Qui sic ait Lib. VIII. (c. 80) *τὸ ἔθος τοῦτο Ῥωμαίοις ἐπιχώριον γέγονεν, ἀφεῖσθαι τῆς τιμωρίας ἁπάσης τοὺς παῖδας, ὧν ἂν οἱ πατέρες ἀδικήσωσι· mos ille Romanis proprius, a pœna omni liberos eximere quorum parentes deliquerunt.* Habet idem *lex Wisigotthica* libro VI. tit. 1. cap. 8. [Non aperte laudat morem illum Dionysius Halicarnassensis, ut jam observavimus, et ex inspectione loci patebit. *J. B.*]

[b] *Prægnantem mulierem mortis supplicio afficere nefas habitum*] Laudat Philo libro *de Humanitate*, (pag. 710.)

[3] Vide DIODORUM SICULUM, *Biblioth.* Lib. I. cap. 77. *J. B.*

[4] Præter *Historicum Græcum*, modo laudatum, vide PLUTARCHUM, *De sera Numinis vindicta*, pag. 552 D. Tom. II. *Ed. Wech.* et ÆLIANUM, *Var. Hist.* Lib. V. cap. 18. *J. B.*

[c] *Romanorum*] L. Imperator Adrianus, 18. D. *de statu hominum.* l. prægnantis, 3. D. *de pœnis.*

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crates, and one of Rome by Dionysius*. And it is one of Plato's Laws, that the ignominy and punishment of the father are not to fall upon the children. So Callistratus the Jurist, adding the reason, that a man does not succeed to the crimes of another. *Would any city,* asks Cicero, *have a law condemning the son or grandson for the delinquencies of the father or grandfather?* Hence to put to death a pregnant woman was held inadmissible by the laws of the Egyptians, Greeks, and Romans.

XV. But if those human laws are unjust which put to death children for the offenses of their fathers, still more unjust was the law of the Medes and Persians, which devoted to destruction the lives of the relatives of the criminal, in order that death might be more bitter to those who had offended against the king, as Curtius speaks; a law which surpasses all others in cruelty, as Ammianus Marcellinus says.

XVI. This, however, is to be noted, that if the children of enemies have anything which is not their own, but of which the right

* See Barbeyrac's corrections of these references.

num [d]devovens et propinquorum capita, quo qui in regem
Lib. viii. 8. peccarant tristiores perirent, ut Curtius loquitur: cujus legis
Lib. xxiii. 6. diritate exsuperari leges omnes scripsit [e]Ammianus Marcellinus.

XVI. Illud tamen est notandum, siquid habeant aut exspectare possint perduellium liberi, in quod jus proprium fit non ipsis, sed populo aut regi, id auferri ipsis posse jure quodam dominii, cujus tamen usus simul in pœnam redundet eorum qui peccaverint. Huc refer quod [5]Antiphanis ut proditoris posteri ἄτιμοι ἐνεγράφησαν, narrante Plutarcho, id est [f]*honoribus prohibiti sunt*, ut Romæ liberi a Sulla proscriptorum.
L. 22. C. De Pœn. Sic in dicta Arcadii lege illud tolerabile in liberos: *ad nullos honores, ad nulla sacramenta perveniant.* Servitus autem quomodo et quatenus in liberos sine injuria transeat, alibi a nobis est explicatum.

XVII. 1 Quod de liberis malo afficiendis ob parentum delicta diximus, idem aptari potest et ad populum vere subditum: (nam qui subditus non est, ex sua culpa, id est ex neg-

[d] *Devovens et propinquorum capita*] Philo morem esse tyrannis dixit cum damnatis una tollere quinque familias eis proximas. Vide Herodianum libro III. Et exemplum Mediolanense occiso Galeatio apud Bizarum Lib. XIV. [Locus Philonis legitur Lib. II. *De Specialib. Legg.* pag. 802 D. sed inspicienti patebit, sensum ejus valde mutatum fuisse ab Auctore nostro. Ille etiam, aut exscriptor, sine dubio posuit heic Herodianum, apud quem nil huc faciens reperitur, pro HERODOTO, qui Lib. III. cap. 119. narrat, Intaphernem, cum liberis et universa familia, capite damnatum fuisse a Dario, secundum Persarum morem. *J. B.*]

[e] *Ammianus Marcellinus*] Abominandas leges vocat. Vide et Concilium Toletanum IV.

[5] Ita omnes Editiones: sed legendum Antiphontis. Vide locum PLUTARCHI, *Vit.* X. *Rhetor.* pag. 833 A. Tom. II. *J. B.*

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belongs to the people or the king, that may be taken from them by the right of dominion, the exercise of that right operating collaterally to the punishment of the criminal. To this we may refer the case of the children of Antiphon, who, as the children of a traitor, were excluded from honours; as at Rome were the children of those proscribed by Sulla. So in the law of Arcadius, that rule concerning children is not intolerable: *Let them be admitted to no honours nor public offices.* How far slavery may pass to children without wrong, we have treated elsewhere.

XVII. 1 What we have said of evil inflicted upon children for the delicts of fathers, may be applied also to a people really subject to their ruler: (for he who is not subject may be punished for his own fault, as we have said, that is, for neglecting to control the offender:) if it be asked whether such a people may be eviltreated on account of the crimes of the ruler or king. We do not now inquire if the Peo-

ligentia, puniri potest, ut diximus:) si quæratur an is populus malo possit affici ob regis aut rectorum facinora: non jam quærimus [g]si ipsius populi consensus accesserit, aut factum aliud quod per se sit pœna dignum, sed agimus de eo contactu qui ex natura oritur ejus corporis cujus caput est rex, membra ceteri. Deus quidem ob Davidis peccatum populum pestilentia confecit, et quidem ut David censet innocentem, sed Deus in vitam ipsorum jus habebat plenissimum.

2 Interim hæc pœna erat non populi, sed Davidis: nam, ut ait scriptor Christianus, *πικροτάτη τιμωρία τῶν ἡμαρτηκότων βασιλέων ἡ τιμωρία τοῦ λαοῦ· acerbissimum est delinquentibus regibus supplicium id quod populis infligitur.* *Quæst. ad orth.* 138. Perinde enim hoc est, ait idem scriptor, ac si quis qui manu peccavit in tergo feriatur: quomodo in simili argumento Plutarchus non aliter id ait accipiendum quam si medicus ad curandam coxam urat pollicem. *De sera Num. vind.* p. 559 E. Hominibus cur id non liceat jam antea diximus.

[f] *Honoribus prohibiti sunt*] Simile reperies in C. in quibusdam, 12. *De Pœnis.* (DECRETAL. v. 37.)

[g] *Si ipsius populi consensus accesserit*] Philo de Ægyptii regis subditis Abrahami tempore. (*De Abrah.* pag. 363 D.) *παραπήλαυσε δὲ τῆς τιμωρίας σύμπας αὐτῷ ὁ οἶκος, μηδενὸς ἐπὶ τῇ παρανομίᾳ δυσχεράναντος, ἀλλὰ πάντων ἕνεκα τοῦ συναινεῖν μονονοὺ συγχειρουργησάντων τὸ ἀδίκημα· sensit et pœnam omnis cum eo familia, quod nemo indignatus esset super injuste facto, sed omnes laudando pene et ipsi illud fecissent.* Josephus, ubi vaticinium contra Jeroboamum prolatum narrat: *μεθέξει δὲ τῆς τιμωρίας καὶ τὸ πλῆθος ἐκπεσὸν τῆς ἀγαθῆς γῆς, καὶ διασπαρὲν εἰς τοὺς πέραν Εὐφράτου τόπους, ὅτι τοῖς τοῦ βασιλέως ἀσεβήμασι κατηκολούθησε· particeps pœnæ et populus erit, excidet quippe felice terra, sparsusque per loca transeuphratensia exsulabit, quod impietati regis socium se fecerit.* (*Ant. Jud.* Lib. VIII. cap. xi. § 1. *Ed. Hudson.*)

ple's consent has been obtained, or if they have done anything which is by itself worthy of punishment; but we inquire concerning the connexion which naturally arises between that body of which the king is the head, and of which others are the members. God, on account of the sin of David, wasted the people with a pestilence; the people being innocent, as David judged: but God had a plenary right over their lives.

2 In the mean time, this was not the punishment of the people, but of David; for as a Christian writer says; *The sharpest punishment of offending kings is the punishment of their people.* It is, as the same writer says, as if one who has sinned with his hand were to be punished with strokes on his back: as Plutarch says, it is no otherwise than when a physician cauterizes the thumb to cure the hip. Why men may not lawfully do the same, we have already said.

XVIII. Idem dicendum de singulis, qui non consenserunt, malo afficiendis circa ea quæ ipsorum sunt, ob delictum universitatis.

XIX. Hæres vero cur de ceteris debitis teneatur, [h] de *L. 20. D. de pœnis.* pœna non teneatur, sicut a Paulo jurisconsulto scriptum est, *si pœna alicui irrogatur, receptum est commentitio jure ne ad hæredes transeat*, vera causa hæc est, quod hæres personam defuncti refert, non in meritis quæ sunt mere personalia, [i] sed in bonis, quibus ut cohærerent ea quæ alicui debentur ex ipsa rerum inæqualitate, simul cum dominio fuit introductum. Dion *Pag. 329 c.* Prusæensis *Rhodiaca: ἅπαντα ὀφείλουσι τὰ τῶν προγόνων οὐχ ἧττον αὐτῶν ἐκείνων εἰς οὓς ἄν ποτε καθήκετο γένος. οὐ γὰρ ἀφίστασθαι φήσετε τῆς διαδοχῆς· quæ debuerunt majores, ea non minus debent posteri; neque enim dicere potestis repudiatam a nobis hereditatem.*

XX. Et hinc sequitur, ut si ultra meritum nova quædam causa obligationis exstiterit, deberi jam possit id quod in pœna erat, quanquam non proprie ut pœna. Sic alibi post sententiam, alibi post litem [6] contestatam, quibus rebus vis contractus

[h] *De pœna non teneatur*] Maimonides titulo גזלה c. vii. sectione 6. Gemara Baba Cama cap. x. § 1.

[i] *Sed in bonis*] Vide Concilium Toletanum VIII. in causa Recceswinthi: vide quæ supra hoc libro, c. xiv. § 10. Nulla est persona quæ ad vicem ejus qui e vita emigraverit propius accedat quam hæres, ut Cicero ait secundo *de Legibus*, (cap. 19.)

[6] Ita Jure Civili Romanorum. Vide *L.* 26 et 58. *D. De Oblig. et act. L.* 139, 164. *De divers. Reg. Jur.* L. 3. § 11. *De Peculio.*

XVIII. The same may be said of the evil inflicted through their property, or the like, upon individuals who have not consented to the crime, on account of the delict of the general body.

XIX. If we ask why, since the heir is bound to the other debts of the deceased, he is not bound to his punishment, as Paulus says the commentators* have decided, this is the true cause; that the heir represents the person of the deceased, not in his deserts, which are matters merely personal, but in his possessions; and with them are inseparably connected his debts; and accordingly this rule came in as soon as ownership came in. So Dio Prusæensis.

* *Commentitio jure*] Difficile satis est definire, quid intelligat Paullus, dum illud *jus commentitium* vocat. Vide A. FABRUM, *Jurispr. Papinian. Tit.* I. *Princip.* II. Illat. 5. MARC. LYCKLAMAM, *Membran.* I. 9. JAC. GOTHOFRED. in *L.* 1. *De Regg. Jur.* pag. 5. Cl. SCHULTING. *Jurisprud. Ante-Justin.* pag. 675. col. 1. *init.* Expendi etiam potest nova interpretatio, quæ legitur in *Actis Eruditorum Lipsiensibus*, ann. 1714. pag. 555. ubi vult Auctor Clar. WÆCHTLERUS, jus *commentitium* esse, quod ex notione quadam communi oritur. *J. B.*

datur, pœna pecuniaria ab hærede debebitur, ut et ea quæ in [7]conventionem deducta est. Jam enim nova accessit debendi causa.

[7] Vide *L. 47. D. de Actionib. emti et vend.* Sed hæc est pœna impropric dicta.

XX. And hence it follows that if, besides desert, some new cause of obligation should arise, that which was a part of the punishment may become debt, though not as a punishment of the heir. Thus, after the sentence of a court, or after the decision of a lawsuit, to which events the power of a contract is given, the pecuniary penalty will be due from the heir, as also matters which were agreed to be so decided. For these events are a new cause of a debt being due.

CAPUT XXII.

DE CAUSIS INJUSTIS.

I. *Explicatur discrimen inter causas justificas et suasorias.*

II. *Bella, quæ utroque causarum genere carent, ferina esse.*

III. *Bella, quæ suasorias causas habent, non justificas, esse prædonum.*

IV. *Quasdam esse causas, quæ falsam habeant justi speciem:*

V. *Ut metum incertum:*

VI. *Utilitatem sine necessitate:*

VII. *Negatum matrimonium in magna fœminarum copia:*

VIII. *Cupiditatem melioris soli:*

IX. *Inventionem rerum occupatarum ab aliis.*

X. *Quid si priores occupatores amentes sint?*

XI. *Injustam causam esse et libertatis desiderium in populo subdito:*

XII. *Et voluntatem regendi alios invitos quasi ad ipsorum bonum.*

XIII. *Item titulum universalis imperii quem quidam adscribunt Imperatori, qui refellitur:*

XIV. *Alii Ecclesiæ, qui item refellitur.*

XV. *Item voluntatem implendi vaticinia sine Dei mandato.*

XVI. *Item id quod debetur non ex jure stricte dicto, sed aliunde.*

XVII. *Distinctio belli cujus causa injusta, et ejus cui aliunde vitium accedit: et diversi utriusque effectus.*

Lib. ii. 1. I. 1 DIXIMUS supra, cum de causis agere institueremus, causas alias esse justificas, alias suasorias. Polybius, qui id discrimen primus notavit, [a]illas vocat προφάσεις, quia

[a] *Illas vocat προφάσεις, quia palam proferri solent, (titulum dixit aliquoties Livius) has generis nomine αἰτίας*] Sic et Plutarchus distinguit in Galba, (pag. 1062 D.) et Dion in rebus Cæsaris et Pompeii: [aut potius Xiphilin. p. 13. *Ed. H. Steph.*] et Polybius, ubi de Romanorum bello in Illyrios agit, excerpto legationum 125. Cum Suetonio recte illas *prætextum*, has *causas* dixeris. Ita enim ille de Julio Cæsare: *et prætextum quidem illi civilium armorum hoc fuit: causas autem alias fuisse opinantur*, (cap. 30.) Thucydides alibi distinguit πρόφασιν et τὸ ἀληθὲς, (Lib. VI. c. 6): ut in Atheniensium motu adversus Siciliam, prætextum fuit opitulari Egestanis, res ipsa, cupiditas Siciliæ sibi acquirendæ. Hermocrates in oratione de Atheniensibus loquens illud πρόφασιν prætextum vocat, hoc διάνοιαν propositum. Utrumque est in libro Thucydidis VI. [postremum in cap. 33. ubi tamen est ἀληθὲς, ut in priori διά-

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CHAPTER XXII. *Of unjust Causes of War.*

I. 1 We have said above, when we began to treat of the causes of war, that some are justificatory or justifying, some suasory or

palam proferri solent, (titulum dixit aliquoties [1]Livius) has generis nomine *αἰτίας*.

2 Sic in bello Alexandri adversus Darium *πρόφασις* fuit ultio injuriarum quas Persæ Græcis intulerant, *αἰτία* cupido gloriæ, imperii, divitiarum, cui accedebat spes magna facilitatis concepta ex Xenophontis et Agesilai expeditionibus. Sic *πρόφασις* belli Punici secundi controversia de Sagunto, causa indignatio Carthaginiensium, ob pactiones quas Romani iniquis temporibus ipsis expresserant, et aucti spiritus ex secundis per Hispaniam rebus; quæ Polybio notata. Similiter Thucydides Lib. iii. 6, 7, 8, 9. belli Peloponnesiaci veram causam censet fuisse vires Atheni- Lib. i. 23, 56, 88. ensium augescentes et Lacedæmoniis suspectas, obtentum vero controversiam Corcyrensium, Potidæensium, et alia; [b]ubi

νοια, quæ Auctor heic permutavit.] Appianus etiam *προφάσεων* vocem usurpat in Mithridatico, (pag. 209.) Idem civilium v. ubi de rupta pace inter Octavium et Sextum Pompeium agit, dicit *αἰτίας* causas alias intus fuisse, alias quæ præferebantur, (pag. 716. *Ed. H. Steph.*) Agathias libro quinto id quod alii *πρόφασιν*, vocat *σκῆψιν καὶ προκάλυμμα*, figmentum et obtentum; cui opponit *αἰτίαν* in historia Hunni Zaberganis. (cap. 5.) Adde quæ diximus supra libri hujus capite i. § 1. Procopius *Persicorum* II. dicit, stultum esse non libere loqui ubi dux est justitia, comes utilitas (cap. 15.)

[1] Exempli gratia, Lib. XXXVII. cap. 54. num. 13. *J. B.*

[b] *Ubi tamen ille αἰτίας et προφάσεως nomina permiscet*] Sic et libro v. (c. 53) de Argivis contra Epidaurios agens, quam prius vocaverat *πρόφασιν*, mox vocat *αἰτίαν*, quomodo et Græcum *ἀρχῶν*, Latinum *principiorum* vocem, aliasque ejus generis, esse sensus ambigui notavimus d. cap. i. § 1. hujus libri. Scriptores Constantinopolitani Imperii id quod alii *πρόφασιν* sæpe *πάτροκλον* vocant, nimirum ex Achillis historia, qui ad resumenda arma ex Patroclo sumpsit materiam. [De hoc vide MEURSIUM, *Gloss. Græco-Barbar.* pag. 415. SALMASIUM, in *Achill. Tatium*, pag. 581. DUPORT. *Gnomolog. Homeric.* pag. 112.]

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impelling. Polybius, who first noted this difference, calls the former *pretexts*, the latter, *causes;* Livy sometimes calls the former *titulus* *.

2 Thus in the war of Alexander against Darius, the *pretext* was revenge for the injuries which the Persians had done to the Greeks; the *cause* was the desire of glory, empire, wealth, added to a great hope of the facility of the conquest, proved from the expeditions of Xenophon and Agesilaus. So the *pretext* of the second Punic war was the controversy concerning Saguntum, the *cause* was the indignation of the Carthaginians excited by the terms which the Romans had imposed upon them in their evil times, and their courage exalted by their successes in Spain; as Polybius notes. In the same way Thucydides judges that the true cause of the Peloponnesian war was the strength of the Athenians, increasing and drawing the suspicion

* For example, Lib. XXXVII. c. 54. num. 13. J. B.

tamen ille *αἰτίας* et *προφάσεως* nomina permiscet. Est idem discrimen in oratione Campanorum ad Romanos, cum adversus Samnites pugnasse se aiunt verbo pro Sidicinis, re pro seipsis: quod viderent ubi conflagrassent Sidicini ad se trajecturum esse incendium. Antiochum [2]quoque Livius memorat in Romanos bella suscepisse, in speciem causas habentem Barcillæ necem et alia quædam, revera quod ex labente Romanorum disciplina spem magnam concepisset. Sic Plutarchus notat non ex vero objectum Antonio a Cicerone, quod causa esset belli civilis, cum Cæsar bellandi certus [c]prætextum tantum ab Antonio cepisset.

Liv. vii. 30.
Lib. xxxvi. 6.
Phil. ii. 22.

II. Sunt qui neutro causarum genere feruntur in bella, [d]periculorum, [3]ut Tacitus loquitur, propter ipsa avidi. Horum vitium humanum excedit modum, *θηριότητα* Aristoteles vocat. De his Seneca: *possum dicere non esse hanc crudelitatem,* [e]*sed feritatem, cui voluptati sævitia est: possumus insaniam vocare: nam varia sunt genera ejus, et nullum certius quam*

Ethic. Nic. vii. 1.
Lib. ii. *de Clem.* c. 4.

[2] Auctor, dum festinans legeret, et ad verborum constructionem non adtenderet, Antiocho tribuit quod de Bœotis dicit Livius: *In* Bœotiam *ipse* [Antiochus] *profectus est; caussas in speciem iræ adversus* Romanos *eas, quas ante dixi* HABENTEM: Brachyllæ *necem, &c.* Eumdem errorem, sine dubio hinc haustum, errat Boeclerus, *Dissert. de Clarigatione,* Tom. II. pag. 1212. *J. B.*

[c] *Prætextum tantum ab Antonio cepisset*] Ταῦτα πάλαι δεομένῳ προφάσεως σχῆμα καὶ λόγον εὐπρεπῆ τοῦ πολέμου πάρεσχεν· *hæc pridem prætexto opus habenti speciem aliquam et decorum titulum bellandi dedere.* Verba sunt in hac historia Plutarchi, (*Vit. M. Antonii,* p. 918 C. D.) Lucani autem, (*Pharsal.* I. 263, &c.)

Cunctasque pudoris
Rumpunt fata moras. Justos fortuna laborat
Esse ducis motus, et causas invenit armis.

[d] *Periculorum, ut Tacitus loquitur, propter ipsa avidi*] De Alanis Ammi-

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of the Lacedæmonians; the pretext, the controversy of the Corcyreans, of the Potideans, and others things: where however he uses the terms *pretext* and *cause* (*πρόφασις* and *αἰτία*) indiscriminately. [See Lib. v. c. 53. Gron.] The same distinction occurs in the oration of the Campanians to the Romans, when they say that they fought against the Samnites, nominally for the Sidicini, really, for themselves; because they saw that when the Sidicini were consumed, the conflagration would spread to them. So Livy says that Antiochus made war upon the Romans, having, as a pretence, the death of Barcillas, and other matters, but really, because he had conceived great hope from the relaxed discipline of the Romans. So Plutarch notes that it was not truly objected to Antony by Cicero that he was the cause of the civil war; since Cæsar was already resolved upon war, and only took his pretext from Antony.

quod in cædes hominum et laniationes pervenit. Cui sententiæ perquam similis est illa Aristotelis ultimo *Nicomachiorum:* Cap. 7.
δόξαι γὰρ ἂν παντελῶς μιαίφονός τις εἶναι, εἰ τοὺς φίλους πολεμίους ποιοῖτο, ἵνα μάχαι καὶ φόνος γίγνοιντο· *omnino enim crudelis habendus sit, qui ex amicis hostes faciat pugnandi et fundendi sanguinis cupiditate.* Dion Prusæensis: τὸ δὲ καὶ χωρὶς ὑποθέσεως πολεμεῖν καὶ μάχεσθαι, τί ἄλλο Orat. xxxvii. p. 473 B.
ἢ μανία παντελής ἐστι, καὶ διὰ ταύτην κακῶν ἐπιθυμία; *nam sine causa in bella ac pugnas ferri, mera est insania malum sibi quærens.* Idem ille Seneca epistola XIV: *nemo ad humanum sanguinem propter ipsum venit, aut admodum pauci.*

III. 1 Plerique vero bellantium causas suasorias habent, aut sine justificis aut cum justificis. Sunt qui justificas plane non curant, de quibus dici potest illud quod a Romanis jurisconsultis est proditum, prædonem esse eum, [f]qui rogatus de possidendi causa, nullam aliam adfert nisi quod possideat. Aristoteles de belli suasoribus; ὡς οὐκ ἄδικον τοὺς ἀστυγεί- 1 Rhet. 3.

anus libro XXXI.] *Ut hominibus quietis et placidis otium est voluptabile, ita illos pericula juvant et bella.* (Cap. 2. p. 672. *Edit. Gron. Vales.*)

[3] Dicit equidem TACITUS *Hist.* III. 41. et V. 19. *periculorum avidi:* Sed illud *propter ipsa* deest. Alibi: *Non tam præmiis periculorum, quam ipsis periculis lætus. Hist.* II. 86. Propius SENECA: *Periclitamur periculi caussa. Quæst. Nat.* V. 18. *J. B.*

[e] *Sed feritatem*] Idem libro II. *de Ira* c. 5. de Apollodoro locutus et Phalaride: *hæc non est ira, feritas est.*

[f] *Qui rogatus de possidendi causa, nullam aliam adfert nisi quod possideat*] L. pro hærede. II. § ultimo et sequentibus legibus, D. *de hæreditatis petitione.* Talis Herulorum in Langobardos πόλεμος ἀπροφάσιστος, bellum sine prætextu. [Apud PROCOPIUM, *Goth.* II. 14.] Galli apud Livium V. *in armis se jus ferre, et omnia fortium virorum esse.* (Cap. 36.)

II. Some there are who rush into war not actuated by either of these kinds of cause, being, as Tacitus says, greedy of danger for its own sake*. These men are of a temper which does not lie within the proper limits of humanity, of a ferine nature. So Seneca, *On Clemency,* says, it is not mere cruelty but a ferine disposition, which delights in human blood and butchery. So Aristotle says that that is a sanguinary character, which makes a man break with his friends for the sake of fighting and shedding blood; and Dio Prusæensis says it is mere madness. So Seneca, Epist. XIV.

III. 1 However, most parties, when they go to war, have impelling causes, either with or without justifying causes. There are some who frankly do not trouble themselves about justificatory causes; to

* As Barbeyrac shews, Grotius has put together two phrases of Tacitus: *Periculorum avidi, Hist.* III. 41, and V. 19; and *Non tam præmiis periculorum, quam ipsis periculis lætus, Hist.* II. 86.

τονας καταδουλοῦσθαι, καὶ τοὺς μηδὲν ἀδικοῦντας πολλάκις οὐδὲν φροντίζουσι; qui justum sit vicinos innoxios in servitutem redigere, et eos qui nullam faciunt injuriam, sæpe nihil curant?

Liv. v. 36. 2 Talis Brennus, qui omnia dicebat esse validiorum. *De Bell. Pun.* xi. v. 183. Talis Silio Annibal, cui

> Pro fœdere proque
> Justitia est ensis.

Sen. *Herc. Fur.* v. 407. Talis Attila, et quibus illud in ore est:

> Quæritur belli exitus,
> Non causa.

Luc. vii. 260. Et:

> Hæc acies victum factura nocentum est:

Tacit. *Ann.* xv. 1. Et:

> Id in summa fortuna æquius quod validius.

Lib. iv. *de Civ. Dei*, 6. Nec male his aptes illud Augustini: *inferre bella finitimis, et inde in cetera procedere, ac populos sibi non molestos sola regni cupiditate conterere ac subdere, quid aliud quam grande latrocinium nominandum est?* De talibus bellis

[g] *Immanitatis omnem humanitatem repellentis*] Agathias libro II. *ὅσοι δὲ κέρδους ἕκατι ἢ δυσμενείας ἀλόγου, μηδὲν ἔγκλημα ἔνδικον ἔχοντες, ἔπειτα φοιτῶσιν ἀνὰ τὴν ὀθνείαν τοὺς μηδὲν ἠδικηκότας σινόμενοι, οὗτοι δὲ ἀλάζονές εἰσι καὶ ἀτάσθαλοι· qui vero aut lucri causa, aut cæco odio, nullam habentes justam querelam, alienas terras invadunt innoxiis noxii, hi homines sunt et superbi et improbi.* (Cap. 1.) Exemplum nobis dat illustre Menander Protector: *ὅτι Βαιᾶνος ὁ τῶν Ἀβάρων σχάγανος οὐδεμιᾶς ἀφορμῆς ἢ σκήψεως λαβόμενος, οὐδὲ ψευδῆ γοῦν κατὰ Ῥωμαίων αἰτίαν ἀξιώσας τινὰ συνθεῖναι, ἀναισχυντώτατα καὶ βαρβαρικώτατα παρέλυσε τὰς συνθήκας· Baianus Avarorum chaganus, nulla occasione aut obtentu, ne conatus quidem causam vel falsam contra Romanos comminisci, inverecunde plane, barbarum in morem exuit pacta.* (Cap. 21.)

[h] *Quales sunt tyranni*] Bene Philo

whom we may apply the maxim of the Roman jurists, that he who, when he is asked by what claim he possesses a thing, can assign no other than that he does possess it, is a robber. Aristotle speaks of those who give no care to the question whether it is just to enslave unoffending neighbours.

2 Such a man was Brennus, who said that everything belonged to the stronger: such is Annibal in Silius, whose *sword is the measure of right and justice:* such Attila; and those who say, as in Seneca, *Our thought the fortune not the cause of war;* or as in Lucan, *This day will make the conquered part the guilty;* or as in Tacitus, that *In the highest fortune what is strongest is most just.* Yet as Augustine says, *To make war on unoffending neighbours and to harass and subjugate them out of mere love of honour, what name does it deserve, except*

Velleius: *bella non causis inita, sed prout eorum merces fuit.* Apud Ciceronem legimus *de Officiis* primo: *ea animi elatio, quæ cernitur in periculis et laboribus, si justitia vacat, non modo virtutis non est, sed potius* [g] *immanitatis omnem humanitatem repellentis.* Andronicus Rhodius: *οἱ μεγάλων ἕνεκα κερδῶν λαμβάνοντες ὅθεν οὐ δεῖ, πονηροὶ καὶ ἀσεβεῖς καὶ ἄδικοι καλοῦνται· οἷοί εἰσιν οἱ τύραννοι, καὶ οἱ τὰς πόλεις πορθοῦντες· qui magni compendii sui causa accipiunt unde non oportet, hi pravi, impii, injusti appellantur,* [h] *quales sunt tyranni et urbium vastatores.*

Lib. ii. 6.
Cap. 19.
In Eth. Nic. iv. 2. p. 202.

IV. Alii causas quasi justificas adferunt, quæ expensæ ad rectam rationem injustæ reperiuntur: et, ut Livius loquitur, non certamen juris, sed vim quæri apparet. Reges plerosque, ait Plutarchus, duobus nominibus, pacis et belli, tanquam nummis uti, non ad id quod justum est, sed ad id quod expedit. Quæ autem sint causæ injustæ, cognosci aliquatenus potest ex justis causis quas hactenus explicavimus. Rectum enim obliqui est index. Sed perspicuitatis causa summa genera annotabimus.

Lib. xxi. 6.
Vit. Pyrrh. p. 389.

in Decalogum: ὅσοι τοίνυν τῶν κλεπτῶν ἰσχὺν προσέλαβον, ὅλας συλῶσι πόλεις, ἀλογοῦντες τιμωριῶν, διὰ τὸ ἐπικυδέστεροι τῶν νόμων εἶναι δοκεῖν· οὗτοι δέ εἰσιν οἱ ὀλιγαρχικοὶ τὰς φύσεις, οἱ τυραννίδος καὶ δυναστειῶν ἐπιθυμοῦντες, οἱ τὰς μεγάλας ἐργαζόμενοι κλοπὰς, σεμνοῖς ὀνόμασι τῆς ἀρχῆς καὶ ἡγεμονίας ἐπικρύπτοντες λῃστείαν τ' ἀληθέστερον· qui vero furum vires nacti sunt, hi totas prædantur urbes, pœnarum securi, quod supra leges eminere videantur. Tales sunt homines ingenio minime civili, dominatuum et potentatus avidi, magna furta committentes, qui pulchris nominibus magistratuum et imperiorum id obtegunt quod verius latrocinium appelletur. (Pag. 763 C. D.) Optime conveniunt hæc cum iis quæ ex Curtio, Justino, Seneca et Augustino producta sunt ad dictum cap. 1, § 1. libri hujus.

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that of a huge robbery? Of such wars, Velleius says they are wars *not entered into for justice, but for gain.* So Cicero says that *Courage without justice not only is not a part of virtue, but is an inhuman extravagance.* And Andronicus Rhodius speaks to the same effect.

IV. Other parties, in going to war, allege justificatory causes, which, when brought to the standard of right reason, turn out unjust; and then it appears, as Livy says, that what is aimed at is, not a trial of right, but of strength. Most kings, says Plutarch, use the two names, *peace* and *war*, only as coins, to procure, not what is just, but what is expedient. What are unjust causes, may be known in some measure from the just causes which we have been explaining: the straight line is the index of what is oblique. But for the sake of perspicuity we shall make some general remarks.

V. 1 Metum ergo ex vicina potentia non sufficere supra diximus. Ut enim justa sit defensio, necessariam esse oportet, qualis non est nisi constet, non tantum de potentia, sed et de animo, et quidem ita constet, ut certum id sit ea certitudine quæ in morali materia locum habet.

2 Quare minime est probanda eorum sententia, qui justam belli causam statuunt, si vicinus nulla pactione impeditus in suo arcem faciat, aut munitionem aliam quæ damnum aliquando dare possit. Nam adversus tales metus contrariæ in suo munitiones et siqua sunt similia remedia quærenda sunt, non vis
Zonar. ix. 15. bellica. Injusta igitur bella Romanorum in Philippum Mace-
Pausan. i. 10. donem, Lysimachi in Demetrium, ni alia causa adfuit. Valde
Germ. c. 35. mihi placet Taciti illud de Chaucis: *populus inter Germanos nobilissimus, quique magnitudinem suam malit justitia tueri, sine cupiditate, sine impotentia: quieti, secretique: nulla provocant bella, nullis raptibus aut latrociniis populantur: idque præcipuum virtutis ac virium argumentum est, quod, ut superiores agant, non per injurias assequuntur: prompta*

[4] Narrat id DIODORUS SICULUS, *Biblioth.* Lib. IV. c. 31. unde Auctor habet. Nam si sequamur APOLLODORUM, Lib. II. cap. 6. n. 1. exemplum huc non faciet, quum, secundum istum, ex pacto peteret Iolem Hercules: vio-

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V. 1 That fear from a neighbouring power is not a sufficient cause, we have said above. For, that defense may be just, it must be necessary; and it cannot be this, except there be clear evidence, not only of the power, but of the *animus* of the party; and such evidence as amounts to moral certainty.

2 Hence we can by no means approve the opinion of those who hold it to be a just cause of war, if a neighbour, being prevented therefrom by no pact, establish a fortress on his own ground, or any other munition of war, which may possibly at some time be mischievous to us. For the proper remedies against such fears are opposing munitions, and the like, not force of arms. Therefore unjust were the wars of the Romans against Philip of Macedon, and of Lysimachus against Demetrius, except there were some other reason. I am much pleased with what Tacitus says of the Chauci: *The most noble people among the Germans, and a people that prefers to secure its greatness by its justice; not greedy, not passionate, but quiet and retired. They provoke no wars, they practise no robbery or plunder of their neighbours; and the great proof of their virtue and their strength is, that it is not by wrong-doing that they preserve their superiority. Yet they can promptly use arms, and if need be, raise armies: they are numerous in infantry and cavalry, and retain their*

tamen omnibus arma, ac, si res poscat, exercitus: plurimum virorum equorumque, et quiescentibus eadem fama.

VI. Nec utilitas par jus facit cum necessitate.

VII. Ita ubi laxa est matrimoniorum copia, negatum aliquod matrimonium causam bello præbere non potest: qualem [4]olim Hercules arripuit in Eurytum, [1]Darius in [5]Scythas.

VIII. Nec magis mutandæ sedis amor, ut paludibus et solitudinibus relictis solum fecundius possideatur: quam Germanis veteribus bellandi causam fuisse ait Tacitus. *Hist.* iv. 73.

IX. Æque est improbum, inventionis titulo sibi vindicare ea quæ ab alio tenentur, etiamsi is qui tenet sit improbus, de Deo male sentiens, aut hebetis ingenii. Nam inventio est eorum quæ nullius sunt. Vict. *de Ind. Rel.* 1. n. 31.

X. 1 Neque ad dominium requiritur aut virtus moralis, aut religiosa, aut intellectus perfectio: nisi quod hoc videtur posse defendi, siqui sint populi omnino destituti a rationis usu, eos dominium non habere, sed ex caritate tantum iis deberi quæ ad vitam sunt necessaria. Nam quæ alibi diximus de Vict. *de Bello,* n. 5, 6, 7, 8. *Id. l.* II. n. 18.

latio autem fidei datæ justam bello caussam præbet. *J. B.*

[1] *Darius in Scythas*] Antoninus Caracalla in Artabanum Parthorum regem: vide Xiphilinum (pag. 356 c. *Ed. H. Steph.*)

[5] Vide Justinum, Lib. II. cap. 5. n. 9. *J. B.*

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reputation even in inaction.

VI. Nor does utility generate a right, in the way in which necessity does.

VII. Thus when there is no want of opportunity of marriage, any marriage denied cannot supply a cause for war; though Hercules formerly took occasion to make war on Eurytus on such grounds, and Darius on the Scythians.

VIII. Neither is the desire of migrating from one place to another a just ground of war; that a nation leaving marshes and deserts, may become possessed of a more fertile soil; which Tacitus mentions as the reason of making war among the old Germans.

IX. It is no less unjust to claim lands on the ground of having discovered them, when they are occupied by another, even though the possessors be bad men, with wrong notions of God, and dull intellects. For those lands only can be discovered which belong to nobody.

X. 1 Nor is there required for ownership [to exclude such claim] either moral virtue, or religion, or perfection of intellect: except that this may, it would seem, be defended; that if there be any people altogether destitute of the use of reason, such may not have ownership, but out of charity those things ought to be given them

sustentatione dominii, quam pro infantibus et amentibus facit jus gentium, ad eos populos pertinet cum quibus est pactorum commercium: tales autem non sunt populi siqui reperiuntur toti amentes, de quo merito dubito.

2 Male ergo Græci Barbaros ob morum diversitatem, forte et quod ingenio cedere viderentur, hostes sibi quasi naturaliter dicebant. Quatenus autem ob peccata gravia et naturam aut societatem humanam impugnantia, auferri dominium possit, alia est quæstio, et modo, cum de pœnarum jure ageremus, nobis tractata.

Plato, *de Rep.* v. p. 470 c. Arist. *Pol.* i. 2. Eurip. *Iphig. in Aul.* v. 1400, *et seqq.* Liv. xxxi. 29. Isocr. *Panath.* p. 267 b. *Hoc libro* c. 20. § 40.

XI. Sed [k] nec libertas, sive singulorum sive civitatum, id est, *αὐτονομία*, quasi naturaliter, et semper quibusvis competat, jus bello præstare potest. Nam libertas cum natura competere hominibus aut populis dicitur, id intelligendum est de jure naturæ præcedente factum omne humanum, et de libertate *κατὰ στέρησιν*, non de ea quæ est *κατ' ἐναντιότητα*, hoc est, ut natura quis servus non sit, non ut jus habeat ne unquam serviat: nam hoc sensu nemo liber est: quo pertinet illud Albutii: *neminem natum liberum esse, neminem servum; hæc postea*

Senec. iii. contr. 21.

[k] *Nec libertas sive singulorum sive civitatum, id est, αὐτονομία, quasi naturaliter et semper quibusvis competat, jus bello præstare potest*] Vide concilium iv. Toletanum, et quæ nos supra cap. iv. hujus Lib. § 14.

only which are necessary to life. For what we have said above, concerning the sustentation of ownership, which the law of nations performs for infants, and persons out of their mind, pertains to those peoples with whom others have an intercourse of pacts; and if there be any people altogether irrational, they are not such: but I much doubt the fact.

2 Therefore it was unjust on the part of the Greeks to say, that the Barbarians were their natural enemies, merely on account of the diversity of manners, or because they seemed to be inferior in intellect. How far dominion may be taken away from a people on account of grave offenses, impugning nature or human society, is another question, and must soon be treated by us, when we speak of the right of punishing.

XI. Nor again can we say of the liberty, either of individuals, or of cities, or states, (that is, *autonomy* or self-government,) that it is either by natural law, and at all times, an attribute of all, or that in the cases in which it is, it furnishes just ground for war. For when we say that liberty by nature belongs to men or to peoples, we are to understand that, of a natural right preceding all human pacts; and of liberty by negation of slavery, not of liberty in opposition to slavery;

nomina singulis imposuisse fortunam. Et Aristotelis illud : I. *Polit.* c. 3.
νόμῳ τὸν μὲν δοῦλον εἶναι, τὸν δ' ἐλεύθερον· e lege venisse ut alius esset liber, alius servus. Quare qui legitima causa in servitutem sive personalem sive civilem devenerunt, contenti sua conditione esse debent, ut et Paulus Apostolus docet: 1 *Cor.* vii. 21.
δοῦλος ἐκλήθης; μή σοι μελέτω· vocatus es ad servitutem? ne id te torqueat.

XII. Neque minus iniquum armis subigere aliquos velle, quasi dignos qui serviant, quos naturaliter servos interdum philosophi vocant. Non enim siquid alicui est utile, id statim mihi licet ei per vim imponere. Nam his qui rationis habent usum libera esse debet utilium et inutilium electio, nisi alteri jus quoddam in eos quæsitum sit. Infantium plane alia est ratio, quorum regimen, cum ipsi jus exercendæ *αὐτοπραγίας* actionumque suarum moderandarum non habeant, occupanti et idoneo natura concedit. Vict. *de Ind.* n. 24.

XIII. 1 Vix adderem stultum esse titulum, quem quidam tribuunt Imperatori Romano, quasi ipse etiam in remotissimos et incognitos hactenus populos jus imperandi habeat. Ayala *de Jur. Bell.* i. 2. n. 29. Covar. *c. peccatum.* p. 2. § 9. n. 5. *et seqq.*

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so that man is not a slave by nature, but he is not by nature a creature that cannot be a slave. For in this latter sense, no one is free. And to this view pertains what is said by Albutius, that *No one is born free, and no one is born a slave;* these names came afterwards to belong to men by their fortune. So Aristotle says, that it is a result of law that one man is free, another a slave. Therefore they who have, by a legitimate course, come into slavery, either personal or civil, ought to be content with their condition; as St Paul teaches, *Art thou called being a servant? Care not for it.* 1 Cor. vii. 21.

XII. Nor is it less unjust to wish to subjugate any by arms, as being worthy to be slaves, or as philosophers sometimes speak, naturally slaves. For even if there be anything which is fit for me, it does not follow that any one has a right to impose it on me by force. For those who have the use of reason, ought to have a free election left them of what is useful to them and what is not, except another have a right over them. The case is plainly different with infants, the government of whom, since they themselves have not the right of independent action and self-direction, nature gives to those who have a claim to it, and can exercise it.

XIII. 1 It would hardly be necessary to notice that the title given by some to the Roman Emperor is absurd, as if he had the right of ruling over the most remote and hitherto unknown peoples; except Bartolus, who was long held the prince of jurists, had ventured

nisi juris consultorum diu princeps habitus Bartolus hæreticum ausus esset pronuntiare qui id negat; nimirum quia et Imperator interdum se [l]mundi dominum vocet, et in Sacris literis imperium illud, quod [m]Romaniam posteriores scriptores vocant, appelletur [n]τῆς οἰκουμένης nomine: qualia sunt et illa:

Ad l. 24. D. de capt. L. ἀξίωσις. 9. Ad l. Rhod.

Orbem jam totum victor Romanus habebat,

Petron. c. 119.

multaque similia per complexionem, aut excessum, aut excellentiam dicta: quippe cum et in iisdem sacris literis sola [o]Judæa sæpe venit nomine τῆς οἰκουμένης: quo sensu accipiendum dictum vetus Judæorum, medio telluris sitam urbem Hierosolyma, [p]id est in medio Judææ, sicut in medio Græciæ Delphi similiter dicti orbis umbilicus. Neque est quod quemquam moveant Dantis argumenta, quibus probare nititur Imperatori jus tale competere, quia id humano generi expediat. Nam commoda quæ adfert, suis compensantur incommodis. Ut

Luc. ii. 1.

De Monarch. i.

Arist. vii. Pol. 4.

[l] *Mundi Dominum vocet*] Ut in concilio Chalcedonensi actione xi. et xii.

[m] *Romaniam posteriores scriptores vocant*] Ut et Athanasius *ad Solitarios* (Tom. i. pag. 832.) Id vix sexta pars erat mundi tunc cogniti.

[n] Τῆς οἰκουμένης *nomine*] Philo *de Legatione*: τῶν πλείστων καὶ ἀναγκαιοτάτων μερῶν τῆς οἰκουμένης, ἃ δὴ καὶ κυρίως ἂν τις οἰκουμένην εἴποι, δυσὶ ποταμοῖς ὁριζομένην Εὐφράτῃ τε καὶ Ῥήνῳ· *de pluribus utilissimisque orbis partibus loquor, quas et eminenter aliquis orbem appellet, definitum amnibus duobus Euphrate et Rheno.* (Pag. 993 d, e.)

[o] *Judæa sæpe veniat nomine* τῆς οἰκουμένης] Hieronymus: *nomen terræ, etiam cum additur particula* omnis, *restringi debet ad eam regionem, de qua sermo est.* [Vide *Palæstinam.* Eruditissimi Relandi, nuper cum summo Reip. literariæ damno his terris erepti, Lib. i. cap. 5. ubi et testimonia Vete-

to pronounce every one a heretic who denies it; namely, because he sometimes calls himself the Lord of the World; and also, because in scripture, the empire is called the empire of the whole inhabited earth, an *œcumenical* empire, according to the Greek word; *Romania* in some later writers. And so Petronius speaks of the victor Roman having *orbem totum*, the whole globe. And many the like things are said, when we use comprehensive, or excessive, or emphatic expressions: as when in the same scripture, Judæa is called *the inhabited earth:* in which sense we are to understand the saying of the old Jews, that Jerusalem is in the middle of the earth, that is, in the midst of Judæa; as Delphi was called the navel of the world. Nor should any one be moved by the argument of Dante, in which he tries to prove that such a right belongs to the emperor, because it is for the advantage of the human race. For the advantages which he adduces are outbalanced by disadvantages. For as a ship may be so large that it cannot be steered, so

enim navis aliqua ad eam magnitudinem pervenire potest quæ regi nequeat, sic et hominum numerus et locorum distantia tanta esse, ut unum regimen non ferat.

2 Deinde vero concesso hoc expedire, jus imperii non sequitur, ut quod nisi ex consensu aut pœna nasci nequit. Ne in omnia quidem, quæ olim fuere populi Romani, Imperator Romanus jus nunc habet: multa enim ut bello quæsita ita bello amissa sunt; alia pactionibus, alia derelictione [q] in aliarum gentium aut regum jus transierunt. Quædam etiam civitates olim plane subditæ, postea tantum ex parte subditæ, aut tantum inæqualiter federatæ esse cœperunt. Nam omnes hi modi aut amittendi, aut mutandi juris, non minus adversus Rom. Imperatorem, quam adversus alios valent.

Silv. *Verb. Bell.* p. 1. n. 21. Covarr. *loco citat.* n. 9.

XIV. 1 Sed et Ecclesiæ jus fuerunt qui adsererent etiam in [6] populos ignotæ hactenus partis terrarum, cum tamen ipse Paulus apostolus aperte dixerit eos qui extra

Vict. *de Ind. Rel.* 21, *et seq.* Ayala, i. 2. n. 29.

rum referuntur de *Hierosolyma* in medio Terræ sita. *J. B.*]

[p] *Id est in medio Judææ*] Discas hoc ex Josephi Lib. III. *Belli Judaici* (cap. 3. § 5. *divis. Hudson.*)

[q] *In aliarum gentium aut regum jus transierunt*] Exemplum sume in Hispania, de qua vide Gomezium in § fuerat: num. 5. *de Actionibus*. Panormitanum in c. venerabilem col. 9. *de Electione*. Jasonem in l. cunctos populos, I. col. 2. Cod. *de summa Trinitate*. Menochium cons. 11, num. 102. Cardinalem Tuschum practicarum conclusionum 345. § rex Hispaniæ. Molinæum in cons. Paris. in pr. num. 20. Chassanæum *de gloria Mundi* parte v. consid. 28. Azorium *Institutionum Moralium* Lib. II. c. 5. p. 2.

[6] Confer heic opus Auctoris nostri *De Imperio Summarum Potestatum circa Sacra*, cap. iv. *J. B.*

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the number of subjects and the distance of places may be so great that they cannot subsist under one government.

2 But even if we grant that such a government is expedient, there does not follow any right of empire, for that can arise only from consent or from punishment. The Roman emperor has not now any right over even all those places which were formerly under the Roman people; for many of these, as they were won by war, so have they been lost by war; some have passed by compacts, and some by dereliction, under the authority of other nations or kings. Again, some cities, formerly entirely subject, have since become subject in part only, or have become merely federate parts of the empire. For all these ways either of losing, or of changing the rights of rulers, are valid against the Roman Emperor, as against any other party.

XIV. 1 There have also been persons who have asserted the right of the Church, even over the peoples who occupy the hitherto unknown parts of the earth. And yet St Paul plainly says, that he does not

Christianismum sunt, judicandi sibi jus non esse: *τί γάρ μοι τοὺς ἔξω κρίνειν*; 1 Cor. v. 12. Et quod jus Apostolis judicandi competiit, quanquam etiam ad res terrenas suo modo pertinebat, erat tamen cœlestis, ut ita dicam, non terrestris ingenii, exercendum scilicet non per arma et flagra, sed per verbum Dei generaliter propositum et ad circumstantias peculiares aptatum, per sigillorum divinæ gratiæ exhibitionem aut negationem, prout cuique conduceret: postremo loco etiam per vindictam non naturalem sed natura ipsa superiorem, ac proinde a Deo procedentem: qualis in Anania, Elyma, Hymenæo, et aliis apparuit.

2 Christus ipse, a quo omnis potestas Ecclesiastica fluxit, et cujus vita exemplar est Ecclesiæ, qua talis est, propositum, negavit regnum suum esse de hoc mundo, hoc est, ejus naturæ cujus sunt cetera regna: addens, alioqui futurum fuisse ut more aliorum regum opera militum uteretur. Nunc vero etiamsi legiones voluisset poscere, poposcisset, non hominum, sed Angelorum. Matth. xxvi. 53. Et quicquid fecit pro jure suæ potestatis, id fecit non humana sed divina vir-

Joh. xviii. 36. Vid. Petr. Dam. *l.* ii. *epist* 9. et Bern. *epist.* 221.

[r] *Signum medendi*] Bene hoc explicat Abulensis ad Matth. ix.

[s] *Non impedio dominationem vestram in hoc mundo*] Hilarius Arelatensis: *non enim ad hoc venerat Christus ut alienam invaderet gloriam, sed ut suam donaret: non ut regnum terrestre præriperet, sed ut cœleste conferret.*

[t] *Dixit Chrysostomus*] Verba ejus sunt de sacerdotio libro II. (Tom. VI. pag. 90. *Edit. Savil.*) *μάλιστα μὲν οὖν τοῖς χριστιανοῖς οὐκ ἀφεῖται πρὸς βίαν ἐπανορθοῦν τὰ τῶν ἁμαρτανόντων πταίσματα· ἀλλ' οἱ μὲν ἔξωθεν δικασταὶ τοὺς κακούργους, ὅταν ὑπὸ τοῖς νόμοις λάβωσι, πολλὴν ἐπιδείκνυνται τὴν ἐξουσίαν, καὶ ἄκοντας τοῖς τρόποις κωλύουσι χρῆσθαι τοῖς αὐτῶν. ἐνταῦθα δὲ οὐ βιαζόμενον, ἀλλὰ πείθοντα δεῖ ποιεῖν ἀμείνω τὸν τοιοῦτον· οὔτε γὰρ*

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judge those who are outside the boundary of Christianity. *What have I to do to judge them that are without?* 1 Cor. v. 12. And the right of judging which pertained to the Apostles, though in its own way it pertained to the things of earth, yet was, as I may say, of a heavenly not of an earthly character; it was to be exercised, not by arms or by scourges, but by the word of God generally set forth, and adapted to peculiar circumstances; by the exhibition or denial of the seals of divine grace [communion and excommunication, G.] according to each one's case: and in short, by a mode of punishment not natural, but super-natural, and proceeding from God; as appeared in the cases of Ananias, Elymas, Hymenæus, and others.

2 Christ himself, from whom all Ecclesiastical power flowed, and whose life is proposed as the pattern of the Church, so far as it is the Church of Christ, said that his kingdom was not of this world; that is, of

tute, etiam tum cum nundinatores e templo ejecit. Flagrum enim tum quoque divinæ iræ erat signum, non instrumentum; ut alias sputum et oleum [r]signum medendi, non remedium. Augustinus ad indicatum Johannis locum: *Audite ergo Judæi et gentes: audi circumcisio: audi præputium: audite omnia regna terrena:* [s]*non impedio dominationem vestram in hoc mundo: regnum meum non est de hoc mundo. Nolite metuere metu vanissimo, quo Herodes ille major, cum Christus natus nuntiaretur, expavit, et tot infantes, ut ad eum mors perveniret, occidit, timendo magis quam irascendo crudelior. Regnum, inquit, meum non est de hoc mundo. Quid vultis amplius? venite ad regnum quod non est de hoc mundo: venite credendo, et nolite sævire metuendo.* *Tract.* cxv. num. 2.

3 Episcopo inter cetera interdicit Paulus ne percussor sit, 1 Tim. iii. 2, ἀνάγκῃ κρατεῖν, *imperare imposita necessitate,* ea scilicet quæ ex humana vi proficiscitur, regum esse, non episcoporum, [t]dixit Chrysostomus. Et alibi: *non est nobis data potestas ut auctoritate sententiæ* (talis scilicet *Act. Ap.* Tom. IV. p. 626. *hom.* iii. *ep. ad Tit.* (p. 385.) *hom.* i. *ep.* 1. *ad Thess. hom.* ii. pp. 168, 169. *de sacer.* Lib. ii.

ἡμῖν ἐξουσία τοιαύτη παρὰ τῶν νόμων δέδοται πρὸς τὸ κωλύειν τοὺς ἁμαρτάνοντας. οὔτε, εἰ καὶ ἐδέδοτο, εἴχομεν ὅπου καὶ χρησώμεθα τῇ δυνάμει, οὐ τοὺς ἀνάγκῃ τῆς κακίας, ἀλλὰ τοὺς προαιρέσει ταύτης ἀπεχομένους στεφανοῦντος τοῦ Θεοῦ διὰ τοῦτο πολλῆς χρεία τῆς μηχανῆς ἵνα πεισθῶσιν ἑκόντες ἑαυτοὺς ὑπέχειν ταῖς παρὰ τῶν ἱερέων θεραπείαις οἱ κάμνοντες· *omnium maxime Christianis non licet vi castigare sontium delicta. Sæculi quidem judices, ubi maleficos sub legum potestatem nacti sunt, multum potestatis jus exercent, et invitos quamvis prohibent ex suopte ingenio vivere. At apud nos non cogendo sed suadendo id agendum est, ut qui ejusmodi sit, melior evadat. Neque enim nobis a legibus ad coercendos peccatores potestatis jus datum est, et si datum*

the same nature as other kingdoms; adding, that if it had been, it would, like other kingdoms, have been defended by its fighting men. But no: if he had asked for legions, they would have been legions of angels. And what he did on the part of his authority, he did, not by human, but by divine agency, even when he drove the money-changers out of the temple. For the scourge which he then used was a sign, not an instrument, of divine wrath; as in other cases, the oil and the spittle was not the remedy, but the sign of cure. And to this purpose Augustine speaks on that passage of St John.

3 A bishop is required by St Paul, among other things, not to be a striker. So Chrysostom says, that to rule by force, that is human force, belongs to kings, not to bishops. And elsewhere, such power is not given to us that we can constrain men from offending by the authority of our judgments, (such, that is,) as include a right of execu-

quæ jus exsequendi per manum regiam, aut militarem, [u]aut juris qualiscunque humani ademtionem in se contineat) *cohibeamus homines a delictis:* et episcopum officio suo fungi ait *οὐ βιαζόμενον, ἀλλὰ πείθοντα, non cogendo, sed suadendo.* Et ex his quidem satis apparet, episcopos, qua tales sunt, jus regnandi in homines humano more nullum habere. [x]Hieronymus regem et episcopum comparans: *ille nolentibus præest, hic volentibus.*

maxime esset, locus non esset juris ejus exercendi, cum Deus coronet non eos qui necessitate sed qui voluntate libera a malo abstinent: quare multo labore opus ut persuadeantur morbidi sponte sua se præbere sacerdotali curationi. Et mox: (pag. 10) *οὐ γὰρ ἑλκύσαι πρὸς βίαν ἐστὶν, οὐδὲ ἀναγκάσαι φόβῳ· neque enim qui a fide aberrat vi pertrahi, imo nec metu compelli potest.* Idem ad Ephes. iv. *εἰς διδασκαλίαν λόγου προεχειρίσθημεν, οὐκ εἰς ἀρχὴν, οὐδὲ εἰς αὐθεντίαν, συμβούλων τάξιν ἐπέχομεν παραινούντων. ὁ συμβουλεύων λέγει τὰ περὶ ἑαυτοῦ, οὐκ ἀναγκάζων τὴν ἀκροατὴν, ἀλλ' αὐτὸν ἀφίησι τῆς τῶν λεγομένων αἱρέσεως κύριον· ad docendos vero homines constituti sumus, non ad imperium, non ad exercitium potestatis. Consiliariorum locum obtinemus suadentium; qui consilium dat, de suo dicit, auditorem non cogit, sed liberam ei relinquit electionem circa ea quæ dicuntur.* (Tom. III. p. 823.) Ambrosius libro II. *de Cain et Abel* c. 4. *Sacerdos quidem officium suum exhibet, at nullius potestatis jura exercet.* Citatur c. verbum, *de Pœnitentia Distinct.* I. (Cap. 51.)

[u] *Aut juris qualiscunque humani ademtionem*] Ad reges enim non ad ecclesiam pertinet judicare de feudis. c. novit 18. *de judiciis:* de possessionibus: c. causam quæ inter 7. *qui filii sint legitimi.* Reges enim superiorem in temporalibus minime recognoscunt: c. per venerabilem, 13. eod. tit. *Christus voluit ut Christiani Imperatores pro vita æterna Pontificibus indigerent, et Pontifices pro cursu temporalium rerum imperialibus legibus uterentur, quatenus spiritalis actio a carnalibus distaret incursibus, et Deo militans minime secularibus negotiis se implicaret:* c. quoniam, 8. distinct. x. et c. cum ad verum, 6. distinctione xcvi. unde aliena non sunt quæ libro primo sunt posita, c. 11. § ultimo, num. 8. ex secundo et octuagesimo canone eorum qui apostolici dicuntur, et quæ in eam rem ibi plura in textu notisque afferuntur.

[x] *Hieronymus*] Idem in epitaphio Nepotiani: *minus licet episcopo quam regi. Ille enim nolentibus præest: hic volentibus. Ille terrori subjicit, hic servituti donatur.* (Tom. I. pag. 25, *Edit. Basil.*) Cassiodorus Lib. XI. in epistola ad episcopos. (Ep. 3.) *episcopus doceat, ne judex possit invenire quod puniat.* Fredericus primus Imperator apud Guntherum *Ligurino de Pontifice,* (Lib. VI. vers. 362, 363):

Ecclesiam regat ille suam, divinaque jura
Temperet: imperium nobis fascesque relinquat.

Suenonem Daniæ regem excommunica-

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tion of the judgment by the hands of kings, or soldiers, or by the deprival of any human right: and he says also, that a bishop discharges his office, *not by coercing, but by persuading.* From this it appears sufficiently, that bishops, as such, have no right of ruling men in a human manner. So Jerome, comparing a king and a bishop, says, that *the king rules unwilling subjects, the bishop, willing ones.*

4 Whether Christian kings may make war on kings who reject

4 An vero reges ipsi iis qui Christianam religionem rejiciunt, arma quasi pœnæ nomine inferre possint, supra capite de pœnis a nobis disquisitum est quantum instituto sufficit.

XV. Hoc quoque monebo non frustra, sed quia veteribus recentia conferens magnum malum, ni caveatur, prævideo, justam belli causam non dare [y]spem conceptam ex aliqua divinorum vaticiniorum explicatione. Nam præterquam quod [z]quæ nondum impleta sunt oracula interpretari certo vix

tum cum Roschildensis episcopus Wilhelmus ab ingressu ecclesiæ opposito baculi pastoralis arceret, et regii capulis admoverent manum, fecit quod episcopi erat, et cervicem porrexit. [Vide *Saxonem Grammatic.* Lib. XI. pag. 189, 190.] Adde quæ supra habuimus libro I. c. 5.

[y] *Spem conceptam ex aliqua divinorum vaticiniorum explicatione*] Vide de Theodoro quodam, Gratiani tempore, Zosimum (Lib. IV. c. 13) et Ammianum Marcellinum (Lib. XXIX. c. 1) de Joanne Cappadoce Procopium *Persicorum* II. (cap. ult.) et Leunclavium *historiæ Turcicæ* Lib. XVIII.

[z] *Quæ nondum impleta sunt oracula interpretari certo vix contingit sine prophetico spiritu*] Clausi enim obsignatique sunt libri prophetici ad præfinitum usque tempus, ita ut intelligi nequeant, Danielis xii. 4, 8, 9. Hieronymus ad Danielem (Tom. V. p. 606 B.) *si propheta audivit et non intellexit, quid facient hi qui signatum librum et usque ad tempus consummationis multis obscuritatibus involutum præsumtione mentis edisserunt?* Procopius *Gotthicorum* I. (cap. 24) τῶν γὰρ Σιβύλλης λογίων τὴν διάνοιαν πρὸ τοῦ ἔργου ἐξευρεῖν ἀνθρώπῳ οἶμαι ἀδύνατα εἶναι· *Sibyllinorum oraculorum sensum ante rei eventum invenire existimo supra hominem esse.* Mox: ταῦτα τε ἀδύνατά ἐστιν ἀνθρώπῳ ὁτῳοῦν πρὸ τοῦ ἔργου τῶν Σιβύλλης λόγων ξυνεῖναι, ἢν μὴ καὶ ὁ χρόνος αὐτὸς ἐκβάντος ἤδη τοῦ πράγματος, καὶ τοῦ λόγου εἰς πεῖραν ἐλθόντος, ἀκριβὴς τοῦ ἔπους ἑρμηνευτὴς γένηται· *fieri nequit, ut homo qualiscunque ante exitum Sibyllina oracula intelligat, sed exspectandum, donec ipsa dies, re jam consummata, et verbis experiendo comprobatis, certa fiat carminum interpres.* Gregoras libro V. ἀλλ' ὥσπερ καὶ τἄλλα τῶν χρησμῳδουμένων δυσείκαστά ἐστι καὶ δυσξύμβολα καὶ πλείστας δεχόμενα τὰς ἀνελίξεις [καὶ ἀναπτύξεις μέχρις αὐτῆς ἐκβάσεως· οὕτως καὶ οὗτος ὁ χρησμὸς ἐπλάνα τοὺς πλείστους, καὶ αὐτὸν δὴ τὸν βασιλέα Ἀνδρόνικον μέχρις αὐτῆς τελευτῆς, ὡς εἰρήσεται. ἐξ ἀνθρώπων δὲ αὐτοῦ γενομένου, αὐτὸς ἑαυτὸν ὁ χρησμὸς διεσάφησεν· *sicut et prædictiones aliæ difficillimæ conjectu interpretatuque sunt, quod et multa habeant involucra, et explicationes recipiant multas: ita et hoc oraculum decepit omnes, ipsumque Imperatorem, quamdiu ei vita mansit. Eo autem erepto rebus humanis, ipsum semet oraculum hominibus aperuit.* (Pag. 67. *Edit. Genevens.*) Cavete vobis nimis audaces theologi: cavete vobis a nimis audacibus theologis politici. Dignus

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Christianity, on that ground, as a punishment, we have sufficiently discussed above.

XV. I will also give a warning not superfluous, but because, comparing old speculations with new, I foresee a great evil if it be not averted. A just cause of war cannot be derived from any explanation of the divine prophecies. For besides that unfulfilled prophecies can hardly be interpreted with certainty without the spirit of prophecy,

contingit sine prophetico spiritu, etiam rerum certarum latere nos possunt tempora. Ac postremo prædictio, nisi expressum adsit Dei mandatum, jus nullum dat, cum Deus, quæ prædixit, sæpe per improbos homines aut pravas actiones ad exitum ire permittat.

XVI. Illud quoque sciendum est, si quis quid debet, non ex justitia propria, sed ex virtute alia, puta liberalitate, gratia, misericordia, dilectione, id sicut in foro exigi non potest, ita nec armis deposci. Nam ad utrumque horum non sufficit, ut id, quod postulatur, sit ex morali ratione faciendum, sed præterea opus est in nobis jus quoddam sit ad illud, quale jus interdum leges divinæ et humanæ dant etiam circa debita aliarum virtutum: quod cum fit, nova tunc debendi ratio accedit, quæ jam ad justitiam pertinet. Id cum deest, [[Flor. iii. 9; Strabon. *Geogr.* xiv. p. 684]] injustum ex hac causa bellum est, ut Romanorum in regem Cypri tanquam ingratum. Nam qui beneficium dedit, nullum habet jus ad reposcendam gratiam: alioqui contractus esset, non beneficium.

Vict. *de Jure Bell.* n. 2. XVII. 1 Notandum et hoc sæpe accidere, ut bello causa quidem justa subsit, sed vitium actioni accedat ex animo agen-

qui inspiciatur locus apud Thuanum libro LXXIX. in anno CIƆ IƆ LXXXIII. de Jacobo Brocardo.

[a] *Honoris studium*] Quod vitium maxime nobis virtutis quadam imagine blanditur. Sed recte monet Augustinus

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even if the events are certain, we may be wrong as to the time. And lastly, the prediction, except there be an absolute command of God, gives no right, since the events which are predicted by God are often brought to pass by wicked men or wicked actions.

XVI. This also must be observed; that if any one has a claim upon him, which is not a claim of justice, but of some other virtue, as liberality, kindness, mercy, charity; as this claim cannot be prosecuted in a court of justice, so also it cannot be asserted by arms. For neither the one nor the other of these can be resorted to, in order that what is demanded may be done for a moral reason: it is requisite besides, that there be in us some right to that very thing: which right sometimes divine and human laws give with respect to the claims which rest upon other virtues [than justice]; and when this happens, then there is introduced a new reason of obligation, and the matter belongs to justice. When that is wanting, the war is unjust for that reason: as was, for instance, the war of the Romans against the king of Cyprus, because he was ungrateful. For he who has bestowed a benefit has no *right* to require a return: if he had, it would be a contract, not a benefit.

tis: sive quod aliud quiddam, non illicitum per se, magis et principalius animum movet quam jus ipsum, puta [a] honoris studium, aut utilitas aliqua, sive privata sive publica, quæ ex bello ipso seorsim a causa sua justifica considerato exspectatur: sive quod adest affectus plane illicitus, ut gaudium acquiescentis in malo alieno sine boni respectu. Sic Aristides de societate secunda, Phocenses ait merito periisse, at non bene fecisse Philippum, cum eos perderet, quippe non religioni studentem, quod præferebat, sed augendo imperio. Tom. II. pp. 256, 257.

2 *Una et ea vetus causa bellandi est*, inquit Sallustius, *profunda cupido imperii et divitiarum. Aurum et opes præcipuæ bellorum causæ*, apud Tacitum: et in tragœdia: Fragm. iv. 3. *Hist.* iv. 74. Sen. *Hippol.* v. 540.

> Rupere fœdus impius lucri furor,
> Et ira præceps.

Quo et Augustini illud recte referas: *nocendi cupiditas, ulciscendi crudelitas, implacatus et implacabilis animus, feritas rebellandi, libido dominandi, et si quæ sunt similia, hæc sunt quæ in bellis jure culpantur.* *Contr. Faust.* xxii. l. 74.

3 Sed hæc, ubi causa justifica non deest, peccatum quidem arguunt, ipsum tamen bellum proprie injustum non faciunt: unde nec ex tali bello restitutio debetur. Covarr. *d. p.* 2. in c. *Pecc.* § 9. n. 2. Cajet. 2, 2. q. 40. art. 1. Silv. *Verb. Bellum*, n. 2. *Summa Ang. Verb. Bellum*, n. 5. *Sum. Ros. ib.* n. 3. et 8. Thom. 2, 2. 66. 8.

libro III. *de Civitate Dei*, cap. 14. *Satius esse cujuslibet inertiæ pœnas luere, quam illorum armorum gloriam quærere.*

Repete quæ ex Agathia supra posuimus hic ad § 3. [Sed in illis locis bella arguuntur per se injusta. *J. B.*]

XVII. 1 We must remark also that this often happens; that there is a just cause really existing for the war, but that the putting it in action becomes vicious from the intention of the agent: either because something else, not in itself unlawful, incites him more than the right, as for instance, the desire of honour, or some advantage, public or private, which is expected from the war, distinct from the justificatory cause; or because there is introduced some affection plainly unlawful, as a pleasure in doing mischief to another without respect of good. So Aristides says that the Phoceans were deservedly destroyed; but that Philip was not in the right when he destroyed them, as not being really in earnest in defense of religion, but seeking to increase his empire.

2 *An eminent and ancient cause of war*, says Sallust, *is a deep-seated desire of empire and of wealth.* So Tacitus, *Gold and riches, a principal cause of war.* And so in Seneca's tragedy of the *Hippolytus.* And so Augustine.

3 But these causes, in which a justifying cause of the war is not wanting, do indeed imply a fault in him who makes the war; but yet the war itself is not thereby unjust: and, therefore, for such a war, no restitution is due.

CAPUT XXIII.

DE CAUSIS DUBIIS.

I. *Dubitandi causa in moralibus unde.*
II. *Nihil faciendum contra animi dictamen quamvis errans.*
III. *Judicium in alteram partem duci argumentis rerum.*
IV. *Aut auctoritate.*
V. *Si utrinque dubitetur in re gravi, et alterum sit eligendum, sumendum quod est tutius:*
VI. *Unde sequi, tali casu a bello abstinendum.*
VII. *Id autem vitari posse colloquio:*
VIII. *Aut arbitrio: ubi de Christianorum regum officio circa partes bellantes:*
IX. *Aut etiam sorte.*
X. *Certamen singulare, ad vitandum bellum, an permitti possit.*
XI. *Meliorem esse conditionem possidentis in pari dubio.*
XII. *Si neuter possideat, in pari dubio rem dividendam.*
XIII. *An bellum utraque ex parte justum detur, multis distinctionibus explicatur.*

1 Eth. Nic. 1. I. VERISSIMUM est quod scripsit Aristoteles, in moralibus non æque, ut in mathematicis disciplinis certitudinem inveniri; quod eo evenit, quia mathematicæ disciplinæ a ma-

[a] *Ut nihil habeant interjectum*] In his mutatio sit εἰς τὸ ἀντικείμενον, in aliis εἰς τὸ μεταξύ.

[1] Expendit hoc PUFENDORFIUS noster, *De Jure Nat. et Gentium*, Lib. I. cap. 2. § 9. Quæcumque Auctor heic dicit, id tantum probant, sæpe sic satis difficile esse axiomata et principia Disciplinarum Moralium ad casus singulares aptare: unde tamen ipsas Disciplinas incertas esse minime sequitur. Qua de re vide quæ observavimus in Præfatione nostra ad Opus Pufendorfianum modo laudatum, § III. num. 3. *J. B.*

[b] *Solent habere interjectum aliquid*] Vide Chrysostomum ad IV. Ephesiorum 31. moral. [id est, in τῷ ἠθικῷ Homiliæ

CHAPTER XXIII. *Of Doubtful Causes of War.*

I. What Aristotle wrote is most true, that certainty is not to be found in morals as it is in mathematics: of which the reason is this, that mathematics separate the forms of things altogether from matter: and that the forms are of such a nature that there is nothing intermediate between two of them; as between a straight line and a curve there is no medium. But in moral matters, circumstances, even the least, often vary the matter; and the forms that are treated have often intermediate degrees, of such latitude that the case sometimes approaches nearer to the one extreme, sometimes to the other. Thus between that which ought to be done, and that which is entirely unlawful, there is a medium which is allowable, nearer

teria omni formas separant, et quia formæ ipsæ tales plerumque sunt, [a]ut nihil habeant interjectum, sicut inter rectum et curvum nihil est medii. [1]At in moralibus circumstantiæ etiam minimæ variant materiam, et formæ, de quibus agitur, [b]solent habere interjectum aliquid, ea latitudine, ut modo ad hoc, modo ad illud extremum propius accedatur. Ita enim inter id quod fieri oportet, et inter id quod fieri nefas est, medium est quod licet, sed modo huic, modo illi parti propinquius: unde ambiguitas sæpe incidit, ut in crepusculo, aut in aqua frigida calescente. Et hoc est, quod ait Aristoteles, ἔστι χαλεπὸν ἐνίοτε τὸ κρίνειν ποῖον ἀντὶ ποίου αἱρετέον· *quid cui anteponendum sit, difficilis sæpe est judicatio.* Andronicus autem Rhodius: τὸ κατ' ἀλήθειαν δίκαιον δυσχερές ἐστι τοῦ δοκοῦντος διελεῖν· *difficile est id, quod vere justum est, ab eo, quod tale videtur, discernere.* iii. *Nic.* 1. *Paraph.* i. 3. p. 10.

II. 1 Primum autem illud est tenendum, etiamsi quid justum reipsa est, sed ab eo fit, qui, omnibus expensis, injustum id existimat, actum esse vitiosum. Hoc enim est, quod dicit Paulus Apostolus, quicquid non fit ex fide, peccatum esse: *Rom.* xiv. 23. [c]quo in loco fides animi judicium de re significat. Nam vim judicatricem humanis actionibus ducem Deus addidit, qua contemta obbrutescit animus.

illius, Tom. III. p. 844. *Edit. Savil.*]

[c] *Quo in loco fides animi judicium de re significat*] Eodem tendunt in eadem Pauli epistola eodem capite ista (vers. 5) ἕκαστος ἐν τῷ ἰδίῳ νοῒ πληροφορείσθω· *unusquisque sui sensus sibi certus sit.* Et (vers. 22) μακάριος ὁ μὴ κρίνων ἑαυτὸν ἐν ᾧ δοκιμάζει· *beatus ille, qui, quod præfert, in eo sui damnator non est.* Ambrosius: *peccatum est, quod aliter fit quam probatum est.* Sequitur Augustinus: citati ambo a Gratiano post cap. 14, causa 28. quæst. 1. Non longe hinc abit illud Plutarchi in *Timoleonte*: δεῖ οὐ μόνον τὴν πρᾶξιν εἶναι καλὴν καὶ δικαίαν, ἀλλὰ καὶ τὴν δόξαν ἀφ' ἧς πράττεται μόνιμον καὶ ἀμετάπτωτον, ἵνα πράττωμεν δοκιμά-

sometimes to the one, and sometimes to the other: whence an ambiguity often takes place, like twilight between day and night, or cold water gradually heated. And this is what Aristotle says, that it is often difficult to decide which of two things is to be preferred: and so Andronicus Rhodius.

II. 1 In the first place, this is certain [as a point of morality], that if anything be just in itself, yet if it be done by him who, having deliberately weighed, thinks it unjust, the act is vicious: as St Paul says, that whatsoever is not of faith is sin; in which place *faith* signifies the judgment of the mind concerning the act. For God has given us the power of judging, as the guide of human actions; and if this be despised, the mind is brutified.

2 Sæpe autem accidit, ut judicium nihil certi monstret, sed hæsitet: quæ hæsitatio si attenta consideratione expediri nequeat, sequendum erit illud Ciceronis: *bene præcipiunt* [d]*qui vetant quicquam agere quod dubites æquum sit an iniquum.* Hebræi magistri [2]dicunt: הסתלק מן הספק *abstine te a re dubia.* Sed hoc locum habere non potest, ubi alicui omnino alterutrum est faciendum, et de utroque, an æquum sit, dubitatur: tunc enim [3]licebit ei eligere, quod minus iniquum ei videtur. Semper enim, ubi electio evadi non potest, minus malum rationem induit boni. Τὰ ἐλάχιστα ληπτέον τῶν κακῶν, ait Aristoteles: Cicero, *de malis minima.* Quintilianus: *in comparatione malorum boni locum obtinet levius.*

De Offic. i. 9. Covar. Tom. i. *de matr.* p. 2. c. 7. § 2. n. 9. Ethic. Nic. ii. 9. De Offic. iii. 1. Lib. vii. 4.

III. Plerumque vero in rebus dubiis post examen aliquod animus non in medio hæret, sed huc aut illuc ducitur [e]argumentis ex re petitis, aut ex opinione, quam habet de aliis hominibus, sententiam super ea re pronunciantibus. Nam et

Vasq. i. 2. *disp.* 62. c. 1. *num* 1. *med.* 1. 2. *quæst.* 14.

σαντες· *requiritur non modo, ut, quod agitur, sit honestum justumque, sed ut firma ac constans adsit persuasio, unde fiat actio, ut, quod sit, fiat ideo quod animus ita faciendum judicaverit.* (Pag. 238 c.)

[d] *Qui vetant quicquam agere quod dubites*] Plinius Lib. I. epist. 18. *Quod dubitas, ne feceris.*

[2] Rabbi Gamaliel, in Pirke Aboth, pag. 14. Ed. P. Fagii. *J. B.*

[3] Hoc non satis recte dici, ostendit Pufendorfius, Lib. I. cap. 3. § 8. ubi et notas nostras videre poteris. *J. B.*

[e] *Argumentis ex re petitis aut ex opinione, quam habet de aliis hominibus*] Augustinus Lib. II. *de Ordine: duplex est via, quam sequimur, cum rerum nos obscuritas movet, aut rationem, aut certe auctoritatem.* (Cap. 5.) Explicat hoc Gabriel Vasquez disput. LXII. cap. 3. num. 10.

[f] *Illud Hesiodi*] Usus est Minutius post malam pugnam apud Livium libro XXII. (cap. 29.) *Eum primum esse virum, qui consulat, quid in rem sit: se-*

2 It often happens that the judgment does not pronounce a certain decision, but hesitates: and if this hesitation cannot be cleared off by an attentive consideration, Cicero's rule must be followed; those advise well who direct you not to do anything of which you doubt whether it is just or unjust: and so the Hebrew masters say, *Abstain from doubtful things.* But this does not apply in cases where we absolutely must do one of two things: in that case we must choose the part that seems least unjust. For in all cases in which the election cannot be avoided, the less unjust assumes the character of good. The least of evils is to be chosen. So Aristotle, Cicero, Quintilian.

III. But in most cases, in dubious matters, the mind after some examination, does not remain undecided, but is drawn this way or that, by arguments derived from the subject, or by the opinion which it has of other men who deliver their sentiments on the subject. For

hic verum est [3]illud Hesiodi, præstantissimum esse per se sapere; proximum, duci aliena ope. Argumenta ex re petuntur e causis, effectis, et adjunctis aliis.

IV. 1 Sed ad hæc recte noscenda, usu quodam et peritia opus est; quam qui non habent, ut activum judicium recte conforment, tenentur audire sapientum consilia. Nam ἔνδοξα, sive probabilia sunt, Aristotele teste, quæ omnibus videntur, aut plurimis, aut certe sapientibus; iisque rursum, aut omnibus, aut pluribus, aut præstantioribus. Et hac via judicandi maxime utuntur reges, quibus artium momenta ediscere aut expendere vix vacat:

Vict. *de Ind. Rel.* 1. n. 12. et *de Jure Belli*, 21. et 24.

i. *Topic.* 1.

> [4]Σοφοὶ τύραννοι τῶν σοφῶν συνουσίᾳ.
> Dat sapere regi turba sapientum comes.

Aristides de concordia ad Rhodios ait, sicut in facti quæstionibus id pro vero habetur unde plures maximeque idonei stant testes, ita sententiarum eas sequendas, quæ plurimis præstan-

Tom. ii. p. 378 B, C.

cundum eum, qui monenti obediat: qui nec ipse consulere, nec alteri parere scit, eum extremi ingenii esse. Et pro A. Cluentio Tullius: *sapientissimum esse dicunt eum, cui, quod opus sit, ipsi veniat in mentem: proxime accedere illum, qui alterius bene inventis obtemperet.* (Cap. 31.) Hesiodi versus, unde hæc fluxere, sic habent:

> Οὗτος μὲν πανάριστος ὃς αὐτῷ πάντα νοήσει
> Φρασσάμενος τά κ' ἔπειτα καὶ εἰς τέλος ᾖσιν ἀμείνω.
> Ἐσθλὸς δ' αὖ κἀκεῖνος ὃς εὖ εἰπόντι πίθηται.
> Ὃς δέ κε μηθ' αὐτῷ νοέῃ, μήτ' ἄλλου ἀκούων
> Ἐν θυμῷ βάλληται, ὁ δ' αὖ ἀχρήϊος ἀνήρ.

> Ille quidem ante omnes, per se ipse quid utile, quid non
> Qui videt, et longe fines prospectat agendi:
> Qui bene consultis didicit parere, secundus:
> At qui consiliis pollet nihil ipse, nec audit
> Suadentes alios, nullos homo vivit ad usus.

(*Opus et Dier.* vers. 293, *et seqq.*)

[4] Vetus dictum proverbiale, quod reperitur apud AULUM GELLIUM, *Noct. Attic.* XIII. 18. ubi videri possunt Intt. De re ipsa diximus in Gallicis nostris ad hunc locum Notis. *J. B.*

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what Hesiod says is true, that the best thing is to be wise one's self, the next best, to be guided by others. Arguments from the subject are taken from the causes, effects, and other adjuncts of it.

IV. 1 But to know them well, a certain practice and skill is necessary: and those who have not this, in order rightly to frame their active judgment, are bound to listen to the counsels of wise men. For the probable opinion, as Aristotle says, is that which is held by all, or by the greater part, or the most eminent. And this is the way of judging which kings mostly use, who have not leisure to peruse or to weigh the technical descriptions of such matters. *The king is wise by the multitude of wise counsellors,* as an old proverb says*. So Aristides. And so the ancient Romans undertook wars only after they had consulted the College of *Feciales,* instituted for that purpose, and the Christian Emperors rarely without consulting the bishops; that if

* Quoted by Aulus Gellius, *Noct. Attic.* XIII. 18. J. B.

tissimisque nitantur auctoribus. Sic Romani veteres non nisi consulto collegio fecialium ad id instituto, Imperatores Christiani vix nisi auditis episcopis, bella suscipiebant, ut, si quid esset, quod religionem posset injicere, ejus monerentur.

V. 1 Accidere autem in multis controversiis potest, ut ab utraque parte probabilia se ostendant argumenta, sive intrinseca, sive ab aliorum auctoritate. Id cum accidit, si res mediocres sunt, de quibus agitur, videtur vitio carere posse electio, in utramvis partem cecideret. At, si de re magni momenti, ut de supplicio capitali hominis, agitur, jam propter magnum discrimen, quod est inter eligenda, [g] præferenda est pars tutior, ut dici solet:

Terent. *Adelph.* ii. 1. 20. In istam partem potius peccato tamen.

Ideo satius est nocentem absolvere, quam innocentem condemnare.

§ 29. n. 13. 2 Scriptor problematum quæ Aristotelis nomen præferunt: *ἕκαστος ἡμῶν μᾶλλον ἂν προέλοιτο τοῦ ἀδικοῦντος ἀποψηφίσασθαι ὡς οὐκ ἀδικεῖ, ἢ τοῦ μὴ ἀδικοῦντος καταψηφίσασθαι ὡς οὐκ ἀδικεῖ* (quibus in verbis vulgo pro *ἀδικοῦντος* legitur *μὴ ἀδικοῦντος*, et contra) *nemo est nostrum*, ait, *qui non malit absolvere quamvis nocentem, quam damnare innocentem.* Et mox addit rationem, quam jam dedimus: *ἔστι γὰρ, ὅταν*

[g] *Præferenda est pars tutior*] Ammianus Marcellinus libro XXVIII. *Si implacabiles iracundiæ sunt, summa est acerbitas: sin autem exorabiles, summa levitas: quæ tamen, ut in malis, acerbitati anteponenda est.* [Cap. i. p. 562. ex Cicerone *ad Q. Fratrem*, Epist. I.] Et hoc explicat Vasquez dicto libro, c. 4. num. 21.

[h] *Omnia prius experiri quam armis*] Dionysius Halicarnassensis in excerptis legationum: *μὴ πρότερον ἄρξαι τῶν ἔργων πρὶν ἢ πειραθῆναι τῶν λόγων· non ante ad res veniendum est, quam tentata sit verborum via.* (Pag. 704. *Edit. Oxon.*) Menelaus apud Libanium: *πρῶτον μὲν γὰρ τὰ δίκαια τῷ λόγῳ πειρᾶσθαι λαμβάνειν, ἀλλὰ μὴ τοῖς ὅπλοις*

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there were any impediment which religion interposed, they might be warned thereof.

V. 1 It may happen, in many controversies, that probable arguments are adduced on both sides, either intrinsic to the subject, or derived from the authority of others. When that happens, if the things in question are of moderate importance, the choice, it would seem, is free from blame, on whichever side it falls. But if there is question of a matter of great moment, as of a capital punishment, then, on account of the great difference between the two sides of the choice, the safer part is to be preferred. It is better to acquit a guilty man than to condemn an innocent.

τις ἀμφιδοξῇ, τὰ ἐλάττω τῶν ἁμαρτημάτων αἱρετέον· *nam ubi quis dubitat, eligendum in quo minus delinquitur.* Antiphon: εἰ δέοι τι ἁμαρτεῖν, τὸ ἀδίκως ἀπολῦσαι ὁσιώτερον, ἢ τὸ ἀδίκως ἀπολέσαι. τὸ μὲν γὰρ ἁμάρτημά ἐστι, τὸ δὲ ἀδίκως ἀποκτεῖναι, ἀσέβημα· *si errandum est, sine jure absolvere, quam per injuriam condemnare, est sanctius. Nam in illo error est, in damnatione insontis, facinus.* Orat. xiv. xv. p 133. [[p. 140, 12]]

VI. Maximi autem momenti est bellum, ut ex quo mala plurima etiam in innocentes sequi soleant. Ideo inter sententias alternantes vergendum ad pacem. Laudatur Silio Italico Fabius: Lib. i. v. 679.

> Cauta speculator mente futuri,
> Nec lætus dubiis parvisque lacessere Martem.

Tres autem sunt modi, quibus vitari potest, ne controversiæ in bellum erumpant.

VII. 1 Primum est, colloquium, *cum duo sint genera disceptandi*, ait Cicero, *unum per disceptationem, alterum per vim, cumque illud proprium sit hominis, hoc belluarum, confugiendum est ad posterius, si uti non licet priore.* Et Terentius: Vict. de Jure Bell. n. 23. De Offic. i. 11. Eunuch. iv. 7. 19.

> [h] Omnia prius experiri quam armis sapientem decet:
> Qui scis, an quæ jubeam sine vi faciat?

ἐπιπηδᾶν, ἀνθρωπινώτερον δήπουθεν· *homini convenientius, prius verborum experimentum facere, quam statim ad arma prosilire.* (Declam. i. pag. 196 d. *Ed. Paris. Morell.*) Non abeunt hinc illa chori dicta in Euripidis *Helena* (vers. 1166, [[1150]] *et seqq.*):

> τὸ θεῶν
> Ἔπος ἀληθὲς εὗρον
> Ἄφρονες, ὅσοι τὰς ἀρετὰς πολέμῳ
> Κτᾶσθε, δορὸς ἀλκαίου
> Λογχαῖσι καταπαυόμενοι
> Πόνους θνατῶν ἀπαθῶς.
> Εἰ γὰρ ἅμιλλα κρινεῖ νιν
> Αἵματος, οὔ ποτ' ἔρις
> Λείψει κατ' ἀνθρώπων πόλεις.
> Stulti nimium, queis virtutis
> Mensura placet unica, ferrum;
> Quibus humani pausa laboris
> Non nisi sævo quæritur ense:
> Nam si virtus sanguine tantum
> Spectanda venit, nunquam discors
> Furor infestas deseret urbes.

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2 The writer of the Problems which go under the name of Aristotle's, says this: and adds the reason just given. So Antipho.

VI. War is a very weighty matter, being a thing from which great calamities fall upon the innocent. Therefore when opinions are balanced, peace must have the preference. So Silius Italicus praises Fabius.

But there are three ways in which controversies may be prevented from breaking out into war.

VII. 1 The first is, Conference. *There are two ways of settling disputed questions,* says Cicero; *one by discussion, the other by force: and the first being the character of man, the second of brutes, we are to*

Argon. iii. 185. Apollonius Rhodius dixit: μηδ' αὔτως ἀλκῇ πρὶν ἔπεσσί γε
Supplic. v. 347. πειρηθῆναι. Et Euripides:

> Λόγοισι πείσων. εἰ δὲ μή, βίᾳ δορός.
> Verbis id impetrabo: sin nequeo, manu.

Idem reprehendit *Supplicibus* civitates, quæ hanc viam omitterent (vers. 748):

> Et vos quoque, urbes, quæ, quod est verbis datum
> Transigere, potius fertis ad cædem arbitram.

Achilles *Iphigenia in Aulide* (vers. 1017, et seqq.):

> Si paret æque, nil mea vobis ope
> Opus est; salutis est in hoc uno satis.
> Ego simul amici gratiam servaverim:
> Minusque vitio vertet omne agmen mihi,
> Ratione si rem gesserim, non viribus.

Quod in *Phœnissis* apud Euripidem legimus (vers. 519):

> πᾶν γὰρ ἐξαιρεῖ λόγος
> ὃ καὶ σίδηρος πολεμίων δράσειεν ἄν·

Lib. xxxv. 45. Id auctum sic extulit apud Livium Phæneas: [i]*multa homines, ne bellare necesse sit, voluntate remittere, quæ bello et*
Lib. vii. 9. *armis cogi non possint.* Mardonius apud Herodotum *Po-*

[i]*Multa homines, ne bellare necesse sit, voluntate remittere, quæ bello et armis cogi non possint*] Donatus *ad Eunuchum: pervulgatum est enim, quod summa vi defenderis quum extorquetur, hoc idem postmodum remitti remittenti.* (Act. I. Sc. II. vers. 94.)]

[k] *Compromissum*] Spreta plerumque potentioribus via. Vide Connestagium de Conjunctione regnorum Castellæ et Portugalliæ, digna tamen, quam insistant æqui et pacis amantes. Fecere magni reges ac populi, quorum in textu memoria. Addamus alios. Arbitri sumti inter Magnum Norvagiæ et Canutum Daniæ reges de regno utroque certantes: Nempe quomodo Julianus primus ejus nominis cum Severo de principatu Romano certante interdicto agere voluit. [Spartian. in *Vit. Pescennii Nigri*, cap. 2.] Magnus rex Suediæ arbiter sumtus inter Ericos duos Daniæ et Norvagiæ reges. In federe Lacedæmoniorum et Argivorum apud Thucydidem: δίκας διδόντας κατὰ πάτρια, *qui stare arbitris volent more avito.* Et mox: εἰ δέ τις τῶν ξυμμάχων πόλις πόλει ἐρίζοι, ἐς πόλιν ἐλθεῖν ἄντινα ἴσαν ἀμφοῖν ταῖς πόλεσι δοκοίη· *si qua sociarum civitatum cum socia civitate controversiam habeat, rem deferant ad civitatem, quæ utrisque æqua videbitur.* Est utrumque apud Thucydidem libro v. (c. 79.) M. Antoninum multi extra

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have recourse to the latter, only if the former fails. So Terence, Apollonius Rhodius, Euripides in several places; and Phæneas in Livy goes further; saying, *In order to avoid war we are to yield many things which cannot be gained by war.* And Mardonius in Herodotus blames the Greeks for not trying negociation before war, being of the same language.

2 Coriolanus in Dionysius says, *If a man asks only for his own,*

lymnia Græcos culpat hac in parte: τοὺς χρῆν ἐόντας ὁμογλώσσους, κήρυξί τε διαχρεωμένους καὶ ἀγγέλοισι, καταλαμβάνειν τὰς διαφορὰς καὶ παντὶ μᾶλλον ἢ μάχῃσι· *quos oportuit, cum ejusdem essent linguæ, caduceatorum et legatorum opera, non præliis, controversias tractare.*

2 Coriolanus apud Halicarnassensem: τὸ μὴ τῶν ἀλλοτρίων ἐπιθυμεῖν, ἀλλὰ τὰ ἑαυτῶν ἀπαιτεῖν, καὶ μὴ τυγχάνοντα τούτου πολεμεῖν, ἅπαντες ἂν ὁμολογοῦσιν εἶναι καλόν· *si quis non aliena cupiat, sed sua postulet, atque, iis non impetratis, bellum moveat, id omnium confessione æquum est.* Apud eundem Halicarnassensem rex Tullus; *quæ verbis componi nequeunt, ea armis* ait *decerni.* Apud Tacitum Vologeses: *æquitate quam sanguine, causa quam armis retinere parta majoribus malueram.* Et rex Theodoricus: *tunc utile solum est ad arma concurrere, cum locum apud adversarios justitia non potest invenire.*

Ant. Rom. viii. 8.

Lib. iii. 11.

Ann. xv. 2.

Cass. iii. *Var.* 1.

VIII. 1 Alterum est inter eos, qui communem judicem nullum habent, [k] compromissum: ἐπὶ τὸν δίκας διδόντα οὐ νόμιμον ὡς ἐς ἀδικοῦντα ἰέναι, ait Thucydides: *in eum, qui arbitrum accipere paratus est, nefas ut in injuriosum*

Lib. i. 85.

Romanum imperium populi controversiarum suarum, ut bella vitarent, arbitrum sumsere: meminit Victor et alii. Apud Procopium *Gotthic.* III. Gepidæ Langobardis dicunt: δίκῃ γὰρ διαλύειν τὰ διάφορα ἐν σπουδῇ ἔχομεν. δικάζεσθαι δὲ οἷς ἂν σπουδάζεται, βιάζεσθαι οὐδαμῇ πρόσεστιν· *arbitro sumto dirimere controversa parati sumus: at qui stare judicio volunt, eos vi impetere iniquum est.* (Cap. 34.) Apud eundem *Gotthicorum* IV. Theudibaldus Franc. rex paratum se ostendit, judicem accipere de iis, quæ Romani disputabant. (Cap. 24.) Vide et quid olim Romani Philippo significaverint apud Polybium excerpto legationum n. 4. et quod est in federe Antiochi ex eodem Polybio itidem in excerptis n. 35. Rex Angliæ judex de Scotiæ successione: Comes Holsatus inter regem Daniæ et fratres, Pontano memorante *Historiæ Danicæ*, libro VII. Adde exempla apud Marianam libro XXIV. cap. 20. XXIX. cap. 23. Parutam libris VII. et XI. Bizarum libro XII. Crantzium libro VI. *Saxonicorum* c. 15. et nostra infra libro III. cap. XX. § 46. [Quod de Marco Antonino dicit Auctor, nec in iis, quæ nomine Aurelii Victoris circumferentur, reperio, nec alibi. Certe in Epitome Victoris id dicitur de Antonino Pio. *J. B.*]

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and betakes himself to war only when he cannot get that, all allow that it is just. And in the same writer, Tullus says, that *what cannot be settled by discussion must be decided by arms.* So the Vologeses in Tacitus: and so king Theodoric.

VIII. 1 Another way is Compromise, or Arbitration, between parties who have no common judge. As Thucydides says, It is wicked to proceed against him as a wrong doer, who is ready to refer the question to

ire. Sic de regno Argivo Adrastus et Amphiaraus Eriphylæ
Lib. iv. 67. Plut. *in Sol.* p. 83 E. judicium permiserunt, narrante Diodoro. De Salamine inter Athenienses et Megarenses lecti judices Lacedæmonii quinque.
Lib. i. 28. Apud dictum modo Thucydidem Corcyrenses Corinthiis significant, paratos se disceptare controversias apud Peloponnesi civitates, de quibus inter ipsos convenisset. Et Periclem
Orat. Plat. ii. p. 248 B. Tom. III. laudat Aristides, quod, ut bellum vitaretur, voluerit δίκῃ διαλύεσθαι περὶ τῶν διαφόρων, *de controversiis arbitros sumere.* Et Isocrates [5]oratione adversus Ctesiphontem laudat Philippum Macedonem, quod quas habebat cum Atheniensibus controversias, de iis paratus esset ἐπιτρέπειν πόλει τινὶ ἴσῃ καὶ ὁμοίᾳ, *arbitrium permittere alicui civitati æquæ utrique parti.*

Liv. iii. 71. 2 Sic olim Ardeates et Aricini, postea [6]Neapolitani et Nolani, controversias suas arbitrio populi Romani permiserunt. Et Samnites in controversia cum Romanis [7]ad com-
Xen. *Cyrop.* ii. 4. § 7. munes amicos provocant. Cyrus sibi et Assyrio arbitrum fert regem Indorum. Pœni in controversiis cum Masinissa,
Liv. xl. 17. ut bellum vitent, ad judicia provocant. Romani ipsi de con-

[5] Nulla est Oratio Isocratis adversus Ctesiphontem, cujus vel nomen nescio an ullibi apud Oratorem illum legatur. Voluit Auctor dicere ÆSCHINEM, in cujus notissima Oratione hæc reperias, pag. 286 A [[65, 27]]. *J. B.*

[6] De his nil, nec apud Livium, nec apud Dionysium Halicarnassensem. Auctor noster exscripsit heic ALBERICUM GENTILEM, *De Jure Belli,* Lib. I. cap. iii. pag. m. 23. Sed narratur res a CICERONE, *De Offic.* I. 10. Et VALER. MAXIMO, VII. 3. num. 4. *J. B.*

[7] Aut valde fallor, aut idem est, quod paullo post Auctor refert, sed ita ut in posteriori loco vere tribuat Ro-

an arbitrator. So Adrastus and Amphiaraus referred the question concerning the kingdom of Argos to the judgment of Eriphyle. So to decide the question concerning Salamis between the Athenians and the Megareans, five Lacedæmonian judges were chosen. So the Corcyreans signify to the Corinthians that they are ready to discuss their respective claims before the cities of Peloponnesus where they might agree to appoint. And Aristides praises Pericles, because to avoid war, he was willing to appoint arbiters. And so Æschines praises Philip for being willing to submit his controversies with the Athenians to any city equally just to both parties.

2 So the Ardeates and the Aretians in old time, and the Neapolitans and the Nolans later, referred their controversies to the decision of the Roman people. And the Samnites in controversy with the Romans appeal to common friends. So do the Carthaginians in their controversies with Masinissa to avoid war: and the Romans themselves concerning their controversy with the Samnites, refer to their common

troversia cum Samnitibus apud Livium ad communes socios. Lib. viii. 23. Et Philippus Macedo in controversia cum Græcis ait se Idem, xxxii. 10. arbitrio usurum populorum, cum quibus pax utrisque fuisset. Parthis et Armeniis postulantibus Pompeius finibus regendis Plut. Pomp. p. 637. arbitros dedit. Fecialium Romanorum hoc præcipuum ait officium fuisse Plutarchus: *οὐκ ἐᾶν στρατεύειν πρότερον* In Num. p. 63 A. *ἢ πᾶσαν ἐλπίδα δίκης ἀποκοπῆναι· ne sinerent prius ad bellum veniri, quam spes omnis judicii obtinendi periisset.* De Gallorum Druidibus Strabo: *ὥστε καὶ πολέμους διῄτων* Lib. iv. p. 197. *πρότερον καὶ παρατάττεσθαι μέλλοντας ἔπαυον· olim et inter bellantes erant arbitri, ac sæpe jam acie congressuros diremerunt.* Eodem officio functos in Iberia sacerdotes idem testis est. Lib. xi. p. 501.

3 [1]Maxime autem Christiani reges et civitates tenentur hanc inire viam ad arma vitanda. Nam si, ut judicia alienorum a vera religione judicum vitarentur, et a Judæis et a Christianis arbitri quidam sunt constituti, et id a Paulo præceptum, quanto magis id faciendum est, ut majus multo vitetur incommodum, id est, bellum? Sic alicubi Tertullia- Vict. de Jure Belli, n. 28.

manis, quod de Samnitibus nusquam legitur, quantum quidem sciam. Originem erroris indicavimus in Notis Gallicis. *J. B.*

[1] *Maxime autem Christiani reges et civitates tenentur hanc inire viam*] Gregoras libro x. *de Alexandro Bulgaro: οὐκ ἄξιον εἶναι λέγων Χριστιανοῖς ἀπηνῶς οὕτωσι κατ' ἀλλήλων ἐπιέναι, ἐνὸν ὁμοδοξεῖν ἀλλήλοις τὰ πρὸς εἰρήνην καὶ ὁμοῦ κατὰ τῶν ἀσεβῶν παρατάττεσθαι· indecorum esse Christianis, tanta cum acerbitate inter se armis certare, cum rationes sint conveniendi ad pacem, et communes vires in impios vertendi.* (Pag. 219. *Edit. Genev.*)

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allies. Philip of Macedon in his controversy with the Greeks, says that he will take the judgment of Peoples who are at peace with both. At the request of the Parthians and Armenians, Pompey gave arbiters to settle their boundaries. Plutarch says that this was the main office of the Roman Feciales, not to allow recourse to be had to arms till all hope of a peaceable decision was gone. And Strabo says of the Druids of the Gauls, that formerly they were arbiters between hostile parties, and often made them part without fighting, who were drawn up in warlike array against each other. The same writer testifies that the priests in Iberia had the same office.

3 But especially are Christian kings and states bound to try this way of avoiding war. For if, in order to avoid being subject to the judgments of persons who were not of the true religion, certain arbiters were appointed both by the Jews and by the Christians, and the practice is commanded by Paul; how much more is this to be done, in order to avoid a much greater inconvenience, namely, war. So in one place

nus argumentatur, non militandum Christiano, ut cui ne litigare quidem liceat: quod tamen, secundum ea, quæ alibi dixinus, cum temperamento quodam est intelligendum. [[i. 2, 9]]

4 Et tum ob hanc, tum ob alias causas utile esset, imo quodammodo factu necessarium, conventus quosdam haberi Christianarum potestatum, ubi per eos, quorum res non interest, aliorum controversiæ definiantur: imo et rationes ineantur [m] cogendi partes, ut æquis legibus pacem accipiant: quem et ipsum olim apud Gallos [n] Druidum fuisse usum Dio-doro ac Straboni proditum. Etiam proceribus suis de regni divisione judicium permisisse Francos reges legimus.

Molina, *disp.* 103. § *quando int. Ejud. Reg. de act. supern. disp.* 31 *dub.* 4. n. 72.

Biblioth. v. 31.

Geogr. Lib. iv. p. 197.

IX. Tertia ratio est [o] per sortem: quam in hoc commendat Dion Chrysostomus oratione in Fortunam altera: et multo ante Solomo Prov. xviii. 18.

Thom. 2, 2. qu. 95. art. 3. *et ibi* Cajet. P. 599.

X. 1 Sortis autem affine quid est certamen singulare, [8] cujus usus non videtur omnino repudiandus, si duo, [p] quorum

[m] *Cogendi partes, ut æquis legibus pacem accipiant*] Vide exemplum apud *Cassiodorum* III. 1, 2, 3, 4. et Gailium *de Pace Publica*, II. cap. xviii. n. 12.

[n] *Druidum fuisse usum*] Druidibus hac in parte, et meliori cum jure, episcopi successere. Vide epistolam episcoporum ad Ludovicum regem in capitulis Caroli Calvi, et de episcopis Hispaniæ Rodericum Toletanum libro VII. cap. 3.

[o] *Per sortem*] Vide Augustinum *de Doctrina Christiana* Lib. I. cap. 28.

[8] Vide infra Lib. III. cap. xx. § 43. et PUFENDORFIUM *De Jure Nat. et Gent.* Lib. VIII. cap. viii. § 5. *J. B.*

[p] *Quorum controversiæ alioqui totos populos gravissimis malis sint implicituræ*] Scriptor tragœdiæ Thebaidos, [*Phœniss.* vers. 564]:

Rex sit e vobis uter,
Manente regno quærite.

Tertullian argues that a Christian must not go as a soldier, since he may not even go to law; which latter, however, as we have already shewn, is to be taken with a certain limitation.

4 And both for this reason and for others, it would be useful, and indeed it is almost necessary, that certain Congresses of Christian Powers should be held, in which the controversies which arise among some of them may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms. This was the office of the Druids of old among the Gauls, as Diodorus and Strabo tell us: and we read that the Frankish kings left to their nobles the judgment of questions concerning the division of the kingdom.

IX. The third way is by Lot; which method is commended for this purpose by Dio Chrysostom, and much earlier by Solomon, Prov. xviii. 18. [*The lot causeth contentions to cease, and parteth between the mighty.*]

X. 1 Closely related to the practice of casting Lots, is the prac-

controversiæ alioqui totos populos gravissimis malis sint implicituræ, inter se parati sint armis decernere, ut olim de Peloponneso Hyllus et Echemus, de regione ad Inachum Hyperochus et Phemius, de Elide Pyræchma Ætolus et Degmenus Epeus, de Iba Corbis et Orsua. Videtur enim id, si non ab ipsis recte fieri, certe a civitatibus posse acceptari, ut minus malum. Apud Livium Metius Tullum sic alloquitur: *ineamus aliquam viam, qua utri utris imperent, sine magna clade, sine multo sanguine utriusque populi decerni possit.* Strabo vetustam hanc fuisse ait Græcorum consuetudinem: [q]et apud Virgilium Æneas æquum fuisse ait, ut inter se et Turnum eo modo res definiretur.

Herod. *Call. sive* ix. 26. Plut. *quæst. Gr.* p. 294. Strab. viii. Liv. xxviii. 21. Lib. i. 23. *Ubi supra,* viii. p. 357.

2 Certe [r]inter ceteros Francorum veterum mores hunc impense laudat Agathias libro primo, cujus ipsa verba (sunt enim insignia) apponam: *ἀλλ' εἴπερ ἄρα καί τιν' ἔριν τοῖς βασιλεῦσιν ἐγγενέσθαι συνενεχθείη, παρατάττονται μὲν*

Cap. 2.

Dion *Othone: πολὺ γάρ που καὶ κρεῖττον καὶ δικαιότερόν ἐστιν ἕνα ὑπὲρ πάντων ἢ πολλοὺς ὑπὲρ ἑνὸς ἀπολέσθαι· multo enim satius justiusque est, unum pro omnibus, quam multos unius causa perire.* [Xiphilin. pag. 204 B. *Ed. H. Steph.*]

q *Et apud Virgilium*] *Æneidos* XI.

Æquius huic Turnum fuerat se opponere morti.

(Vers. 115.) Pari de causa Antonius Octavium ad singulare certamen provocabat. Plutarchus *Antonio.* [Non ea de caussa, sed *ἀντικομπάζων*, ut dicit PLUTARCHUS, pag. 944 E. *J. B.*]

r *Inter ceteros Francorum veterum mores*] Vide Caroli Calvi capitulum apud S. Arnulfum, et pactionem Aquisgranensem. Æquitas eadem apud Langobardos. Vide Paulum Warnafredi libro I. cap. 12. IV. cap. 17. V. cap. 40.

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tice of Single Combat: of which the use does not appear to deserve altogether to be repudiated, if two persons whose controversies would otherwise involve two peoples in great evils are prepared to decide the question by arms, as formerly Hyllus and Echemus fought for Peloponnesus; Hyperochus and Phemius for the region on the Inachus; Pyræchma the Etolian and Degmenus the Epean for Elis; Corbis and Orsua for Ibas. For we may grant that if that be not done by the parties without blame on their part, yet that it may be accepted by the states in question as the lesser evil. So in Livy Metius says to Tullus, *Let us take a course by which we may decide without great bloodshed in each people which shall govern the other.* Strabo says that this was an ancient custom of the Greeks, and in Virgil, Eneas says it was right that the question between him and Turnus should be so decided.

2 Among the other customs of the Franks, this is especially the object of Agathias's praise. He says that if their kings have any quarrel, the armies on each side are assembled and brought face to face,

ἅπαντες ὡς πολεμήσοντες καὶ τοῖς ὅπλοις διακριθησόμενοι, καὶ εἶτα ὁμόσε χωροῦσιν. ἰδόντες δὲ ἀλλήλους ἑκατέρωθεν ἡ πληθὺς, αὐτίκα τὸ χαλεπαῖνον ἀποβάλλοντες εἰς ὁμοφροσύνην μεταχωροῦσι, καὶ τοὺς ἡγεμόνας κελεύουσι δίκῃ μᾶλλον τὰ ἀμφίβολα διακρινήσασθαι. εἰ δὲ μὴ, μόνους ἐκείνους ἀγωνίζεσθαι, καὶ ἐν σφίσιν αὐτοῖς διακινδυνεύειν, ὡς οὐχ ὅσιον ὂν, οὐδὲ πάτριον, ἰδίας αὐτῶν ἕνεκα δυσμενείας, τὰ κοινὰ πημαίνεσθαι καὶ ἀνατετράφθαι. εὐθύς τε οὖν τάς τε φάλαγγας διαλύουσι, καὶ τὰ ὅπλα τίθενται, καὶ τὸ λοιπὸν εἰρήνη αὖθις καὶ ἡμερότης, φοιτήσεις τε παρ' ἀλλήλους ἀφύλακτοι, καὶ ἐπιμιξίαι, καὶ φροῦδα οἴχεται τὰ δεινά. οὕτως ἄρα αὐτοῖς τὸ μὲν ὑπήκοον δίκαιον καὶ φιλόπατρι. τὸ δέ γε ἄρχον εὐμενὲς ἐν δέοντι καὶ πειθήνιον· si quæ forte inter reges oriantur controversiæ, aciem quidem omnes instruunt, tanquam bellaturi, ad rem armis decernendam: et obviam alii aliis procedunt. At ubi conspicati sunt se invicem exercitus, abjecta ira ad concordiam redeunt, et regibus auctores sunt, ut jure potius certent: aut si id nolint, ipsi inter se singulari dimicent certamine, et suo duntaxat ipsorum periculo rem transigant: neque enim aut æquo et bono, aut patriis institutis convenire, ut ipsi ob propria odia bonum publicum labefactent aut evertant. Ergo confestim solvunt exercitus, et restituta pace tuto inter se commeant, sublatis malorum causis. Tanta in subditis cura justi-

[8] *Magis tamen ad id tenetur qui petit, quam qui possidet*] Vide Herreram tomo II.

[9] Vide supra, cap. v. § 18. *J. B.*

[1] *Distinguendæ sunt variæ acceptiones vocis justi*] Sic Gratianus causa XI.

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and then the kings are told to fight the matter out between themselves, and the two armies lay down their arms and mix like friends.

XI. But though in a doubtful case, both parties are bound to seek for conditions of compromise by which war may be avoided, the party which makes a claim is more bound than the party which is in possession. For that in parity of case, possession is a presumption, to be accepted as favourable, is a matter which agrees not only with civil but with natural law: of which we have given the reason from the Problems ascribed to Aristotle, [cap. v. § 12.] And we may here add, that he who knows himself to have a good cause, but has not sufficient documents to convince the possessor of the injustice of his possession, cannot lawfully make war; because he has not the right of compelling the other to give up possession.

tiæ et patriæ amor: in regibus vero animus placidus et suis obsequens.

XI. Quanquam vero in causa dubia pars utraque tenetur quærere conditiones, quibus bellum vitetur, [s]magis tamen ad id tenetur, qui petit, quam qui possidet. Ut enim in pari causa melior sit possidentis conditio, non civili tantum juri sed et naturali convenit: cujus rei causam alibi etiam ex Aristotelis quæ dicuntur problematibus [9]attulimus. Atque hic et illud addendum est, ab eo, qui justam causam habere se scit, sed documenta non habet sufficientia, quibus possessorem de injustitia suæ possessionis convincat, bellum licite non sumi: quia non habet jus cogendi alterum, ut de possessione decedat.

L. in pari. 123 *D. de R. I.* Vict. *de Jure Bell.* n. 27. et 30 Less. *de Just.* c. 29 *dub.* 10. Molina. *disp.* 103. § *in secundo vero.* Lorca 2, 2. § 3. *disp.* 53. n. 4.

XII. Ubi vero et jus ambiguum est, et neuter possidet, aut ex æquo uterque, ibi iniquus censendus erit, qui oblatam rei controversæ divisionem repudiat.

Lorca 2, 2 § 40. *disp.* 53. Soto. v. *de Just. et jur.* 41. art. 7.

XIII. 1 Ex his, quæ diximus, definiri potest illa a multis agitata quæstio, an bellum, ratione habita eorum, qui principales belli motores sunt, utrinque justum esse possit. [t]Distinguendæ enim sunt variæ acceptiones vocis *justi*. Justum enim aliquid dicitur aut ex causa, aut secundum effectus. Ex causa rursum, aut speciali acceptione justitiæ, aut illa generali, qua omnis rectitudo eo venit nomine. Specialis acceptio iterum dividitur in eam quæ ad opus pertinet, et eam, quæ pertinet ad operantem; quarum [1]illa potest dici

Covarr. *c. Peccat.* § 10. n. 6. *Alc.* 2. *parad.* 21. Fulgos. *l.* 5. *de Just.* Piccol. vi. *Phil. Civil.* c. 21. Alberic. Gent. i. 6.

quæstione iii. post c. Episcopus, 65. distinguit *justitiam causæ, ordinis, animi.*

[1] Hæc omnia, *quarum illa......negativa*, in sola prima Editione leguntur, et in aliis omissa sunt incuria typothetarum, ut quivis videt. *J. B.*

XII. But when the right is ambiguous, and neither is in possession, or each is equally so, then if one of the parties refuse to divide the matter in question, he is to be reckoned unjust.

XIII. 1 From what we have said, we may decide the question moved by many writers, whether a war, regarded in reference to those who are the principal movers of it, can be just on both sides. We must distinguish various acceptations of the word *just*. A thing is called just from its cause, or from its effect. And again, from its cause, either in the special acceptation of justice, or in that general acceptation in which all rectitude or rightness comes under that name. Again, the special acceptation is divided into that which belongs to the act itself, and that which belongs to the agent; of which the former may be called positive, the latter negative. For the agent

positiva, hæc negativa: nam ipse operans juste agere interdum dicitur, quoties injuste non agit, etiamsi id, quod agit, justum non sit: quomodo recte distinguit Aristoteles, τὸ ἀδικεῖν, et τὸ ἄδικον πράττειν, *injuste agere*, et *agere quod injustum est.*

Lib. v. *Eth.* c. 10. et 11. *Rhet.* i. 13. Aug. xv. *de Civ. Dei*, 5. et xix. 15. Covar. *c. Pecc.* § 10. n. 2. Vict. n. 32. Suar. *de Leg.* iii. 8. Alph. de Cast. *de Potest. leg. pœnal.* i. 1. et 3.

2 Speciali et ad rem ipsam relata acceptione bellum utrumque justum esse non potest, ut nec lis; quia facultas moralis ad contraria, puta ad agendum et ad impediendum, non datur per rei ipsius naturam. At vero, ut neuter bellantium injuste agat, fieri sane potest: injuste enim agit nemo, nisi qui et scit, se rem injustam agere: multi autem id nesciunt. Sic juste, id est, bona fide litigari potest utrimque. Multa enim et in jure et in facto, unde jus oritur, fugere homines solent.

3 Generali acceptione justum dici solet, quod omni culpa agentis vacat. Multa autem etiam sine jure fiunt absque culpa, ob ignorantiam inevitabilem: cujus rei exemplum est in his qui legem non observant, quam sine culpa sua ignorant postquam lex ipsa promulgata est, et tempus per se ad scientiam sufficiens transiit. Sic et in litibus accidere poterit, ut pars utraque non modo injustitiæ, sed et omni alio vitio

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is sometimes said to act justly, when he does not act unjustly, although what he does be not just; as Aristotle rightly distinguishes, *to act unjustly*, and *to do an unjust thing.*

2 In the special acceptance of justice, as bearing upon the thing itself, a war cannot be just on both sides, as a lawsuit cannot. Because a moral claim to two contrary things, to act and to prevent the action, by the nature of the subject, cannot exist. But it may be that neither of the belligerent parties act unjustly: for no one acts unjustly except he who knows that he is doing an unjust thing: and many persons do not know this when it is so. Thus persons may carry on a lawsuit justly, that is, *bona fide* on both sides. For many points both of law, and of the facts from which the law arise, escape the notice of the parties concerned.

3 In a general acceptation, that is called *just* which is free from all fault of the agent. Many things are done without right, or done without fault, on account of inevitable ignorance; of which we have an example in those who do not observe the law, being ignorant of it without any fault of theirs, though it has been promulgated, and a sufficent time for their becoming acquainted with it has elapsed. So in litigation it may happen that both parties are free not only from injustice, but from all other vices; especially when both parties, or at

careat, præsertim ubi pars utraque, aut altera litigat non suo sed alieno nomine, puta ex tutoris officio, cui congruit jus etiam incertum non deserere. Sic Aristoteles in litibus juris controversi, ait neutrum esse improbum, quod ipse dicit πονηρόν. Cui consentiens Quintilianus posse accidere ait, ut ex utraque parte orator, id est, vir bonus, dicat. Imo et juste judicare judicem ambigue dici ait Aristoteles, significari enim aut judicare ὡς δεῖ, *plane ut oportet*, sine ulla ignorantia, aut κατὰ τὴν ἑαυτοῦ γνώμην, *ex animi sui sententia*. Et alibi ait: εἰ ἀγνοῶν ἔκρινεν, οὐκ ἀδικεῖ, *si quis per ignorantiam judicaverit, non egit injuste.*

iii. *Rhet.* 17. Lib. ii. 17. *Top.* i. 13. *Nic.* v. 12.

4 At in bello vix est, ut temeritas saltem omnis et dilectionis defectus absit, ob negotii ipsius gravitatem, quæ omnino talis est, ut causis probabilibus non contenta, quam maxime evidentes requirat.

5 At justum si accipimus, quoad effectus quosdam juris, certum est, bellum hoc sensu justum utrimque dari, ut ex iis apparebit, quæ de bello publico solenni infra a nobis dicentur. Sic enim et sententia non ex jure lata et possessio sine jure habent quosdam juris effectus.

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least one, litigates not on his own account, but on that of another; as for instance, in consequence of the office of guardian or trustee, whose business it is not to desert a right which is only doubtful. So Aristotle says that in a doubtful question of law, neither side is bad; and Quintilian, that there are cases in which a good man may speak as an advocate on either side. Aristotle says too, that there are two senses in which we may say the judge judges rightly; the one, in which he judges as he ought according to the case, not making allowance for ignorance; the other, in which he judges sincerely as he thinks. To do this, as he says in another place, is not to judge unjustly.

4 But in war it cannot easily happen that there is not, on one side, at least temerity and a lack of charity, the matter being so grave, that we ought not to be content with probabilities, but should require evident causes.

5 If we take *just* as to some legal effects, it is certain that in this sense a war may be just on both sides; as will appear by what we shall have to say hereafter of a penal public war. So a sentence of a judge, though given not according to law, and possession without right, have certain legal effects.

CAPUT XXIV.

MONITA DE NON TEMERE ETIAM EX JUSTIS CAUSIS SUSCIPIENDO BELLO.

I. *Jus sæpe remittendum, ut bellum vitetur:*
II. *Maxime jus ad pœnas:*
III. *Præsertim a rege læso.*
IV. *Etiam cura sui et suorum abstinendum sæpe bello.*
V. *Regulæ prudentiæ circa electionem bonorum.*
VI. *Exemplum in deliberatione inter studium libertatis et pacis: qua internecio populi evitetur.*
VII. *A pœnis exigendis abstinere debere qui non multo sit validior.*
VIII. *Restare, ut bellum non sit suscipiendum, nisi ex necessitate:*
IX. *Aut ex maxima causa cum maxima occasione.*
X. *Bellorum mala ob oculos posita.*

I. 1 QUANQUAM instituti, quod de jure belli inscriptum est, pars proprie non videtur exsequi, quid circa bellum virtutes aliæ præcipiant aut suadeant, obiter tamen obviam eundum est errori, ne quis existimet, ubi jus satis com-

[a] *Non ob quamvis causam talem bellum suscipiendum*] Seneca suasoria v. *Gallio dixit, bellum suscipiendum fuisse pro libertate, pro conjugibus, pro liberis: pro re supervacua et nihil nocitura, si fieret, non esse suscipiendum.* Plus aliquid Apollonius dixit regi Babyloniæ apud Philostratum Lib. I. cap. 23. (38. *Edit. Olear.*) *προσετίθει δὲ καὶ τὸ μὴ δεῖν ὑπὲρ κωμῶν, ὧν μείζους κέκτηνται τάχα καὶ ἰδιῶται, διαφέρεσθαι πρὸς Ῥωμαίους, καὶ πόλεμον οὐδ' ὑπὲρ μεγάλων αἴρεσθαι· addidit vero, non oportere cum Romanis disputare de vicis, quibus majores privati sæpe possident, ad bellum vero ne ob magnas quidem venire causas.* Josephus altero libro *adversus Appionem* de popularibus suis: *οὔτε τὴν ἀνδρίαν ἠσκήσαμεν ἐπὶ τῷ πολέμους ἄρασθαι χάριν πλεονεξίας, ἀλλ' ἐπὶ τῷ τοὺς νόμους διαφυλάττειν. τὰς γοῦν ἄλλων ἐλαττώσεις πρᾴως*

Chapter XXIV. *Warnings against making War rashly, even for just causes.*

I. 1 Although it might seem that we who profess to write about the Rights of War, that is, its justice, have nothing to do with the consideration of what other virtues besides justice commend or recommend; yet we must try to obviate the error which would be committed if any one were to think that when the right was once established, it is forthwith either proper that war should be undertaken, or even that it is always lawful to undertake it. For on the contrary, it is mostly more right and more pious to give up one's rights. For as we have already said, we may even sacrifice our life in order to further, as much as is in us, the life and eternal salvation of another.

pertum est, statim aut oportere bellum suscipi, aut semper etiam licere. Contra enim evenit, ut plerumque magis pium rectumque sit de jure suo cedere. Nam nostræ quoque vitæ curam honeste deseri, ut alterius et vitæ et saluti perpetuæ, quantum in nobis est, consulamus, supra suo loco dictum est. Maxime autem Christianis hoc convenit, qui in eo perfectissimum Christi imitantur exemplum, qui pro nobis adhuc impiis et infestis mori voluit, Rom. v. 6. Quod ipsum multo etiam magis nos excitat, ne res nostras aut nobis debitas persequamur cum tanto aliorum incommodo, quantum secum ferunt bella.

Vict. de Jure Belli, n. 14. et 33.

2 [a]Non ob quamvis causam talem bellum suscipiendum, et Aristoteles monet, et Polybius. Nec a veteribus [1]laudatus Hercules, quod Laomedonti et Augiæ arma intulit ob non solutam laboris mercedem. Dion Prusæensis in ea oratione, quæ est de bello et pace, non hoc tantum ait quæri solere, *εἰ συμβέβηκεν ἀδίκημα παρὰ τούτων, οἷς διανοοῦνται πολεμεῖν*, *an injuria accepta sit ab his, de quibus bello petendis agitur*, sed etiam, *πηλικόν τε τοῦτο συμβεβηκὸς*, *quanti æstimandum sit id, quod accidit.*

Rhet. ad Alex. c. 3.
Lib. iv. 31.
Pausan. v. 2.
p. 275 c.

ὑπομένοντες, ἐπειδάν τινες ἡμᾶς τὰ νόμιμα κινεῖν ἀναγκάζωσι, τότε καὶ παρὰ δύναμιν αἱρούμεθα πολέμους καὶ μέχρι τῶν ἐσχάτων ταῖς συμφοραῖς ἐγκαρτεροῦμεν· neque nostri fortitudinem exercent, ut suas res augeant, sed ut leges ipsis maneant: cetera igitur damna ferentes leniter, ubi sunt, qui nos a legibus cogant discedere, tunc etiam supra vires bella sumimus, et ad ultima usque mala duramus. (Pag. 493. § 47. *division. Hudson.*)

[1] Sed nec vituperatus, saltem a PAUSANIA, cujus locus in ora libri indicatur, et ubi dicitur tantum, in illo bello nihil valde memorandum gessisse Herculem: Τῷ δὲ Ἡρακλεῖ πρὸς τὸν Αὐγέαν πολεμοῦντι, οὐδὲν ὑπῆρχεν ἀποδείκνυσθαι λαμπρὸν. Forte decepit Auctorem festinanter legentem, aut ex memoria laudantem, vox illa λαμπρὸν. *J. B.*

And this is especially suitable to a Christian's character; who in doing this, imitates the perfect example of Christ, who was willing to die for us when we were yet ungodly and hostile. Which is a reason why we should not prosecute our rights or our dues to the inconvenience of others, to so great an extent as war occasions.

2 That war is not to be undertaken for every such cause, both Aristotle and Polybius teach us. Hercules is not praised* by the ancients for that he took away the arms of Laomedon and Augias, because they did not pay him for his labour. Dio Prusæensis says that the question is to be asked, not only whether an injury has been

* But neither is he blamed, at least in the passage of Pausanias quoted. J. B.

II. 1 Ad pœnas vero omittendas multa sunt, quæ nos hortantur. Videamus, quam multa patres in filiis dissimulant: qua de re dissertatio est Ciceronis apud Dionem Cassium. *Pater*, [b] ut Seneca ait, *nisi multæ et magnæ injuriæ patientiam deviccrunt, nisi plus est, quod timet, quam quod damnat, non accedet ad decretorium stylum:* unde non multum discrepat Phinei dictum, recitante Diodoro Siculo: *μηδένα πατέρα λαβεῖν παρ' υἱῶν ἑκουσίως τιμωρίαν, εἰ μὴ τῷ μεγέθει τῶν ἀδικημάτων ὑπερθοῖντο τὴν φυσικὴν τῶν γονέων εἰς τέκνα φιλοστοργίαν*, et illud Andronici Rhodii, *οὐδεὶς πατὴρ ἀφίσταται τοῦ υἱοῦ, εἰ μὴ ὑπερβαλλόντως εἴη μοχθηρός.*

Lib. xliv. p. 290 A, B.

Lib. iv. 45.

Paraph. viii. 18. p. 569.

2 At quisquis alium punire vult, [c] rectoris, id est patris, quodammodo personam suscipit: quo respiciens Augustinus ad Comitem Marcellinum: *imple*, inquit, *Christiane judex*, *pii*

Epist. 159.

[b] *Ut Seneca ait*] *De Clementia* I. cap. 14. Augustus patri in consilio assidens de filio, qui in parricidio deprehensus esset, dixit: *relegandum, quo patri videretur. Non culeum, non serpentes, non carcerem decrevit: memor non de quo censeret, sed cui in consilio esset: mollissimo genere pœnæ contentum esse debere patrem dixit.* Verba sunt Senecæ eodem libro c. 15. Terentius *Andria* (V. 3. 32):

Pro peccato magno paululum supplicii satis est patri.

Philo *περὶ εὐγενείας* ait: *πατέρας ἀπαρνήσεις χρηματίζειν τῶν υἱῶν, ἀποσχοινίζοντας αὐτοὺς τῆς οἰκίας καὶ συγγενείας, ὅταν τὴν ἐκ φύσεως περιττὴν καὶ ὑπερβάλλουσαν εὔνοιαν ἡ ἐν ἐκείνοις μοχθηρία κατακρατήσειεν· patres abdicationis tristia verba pronuntiant, filiosque a domo sua et omni cognatione abrumpunt, ita demum, ubi amorem illum, quem ingentem ac super omnia eximium natura parentibus indidit, filiorum improbitas vicit.* (Pag. 904 B.) Cicero *pro Ligario: ignoscite, Judices, erravit, lapsus est, non putavit: si unquam posthac ad parentem sic agi solet.* (Cap. 10.)

[c] *Rectoris, id est patris, quodammodo personam sustinet*] Seneca epistola LXXXVII: *Clementia alieno sanguini tanquam suo parcit, et scit homini non esse homine prodige utendum.* Diodorus Siculus in fragmentis: *οὐ δεῖ τοὺς ἁμαρ-*

received from those with whom we think of going to war, but also at what amount it is to be estimated.

II. 1 To pass over offenses without punishment, is a course to which many reasons exhort us. See how many things parents overlook in children: on which Cicero in Dio Cassius treats; so Seneca; and Phineus in Diodorus; and Andronicus Rhodius.

2 Now whoever undertakes to punish another, assumes in a certain degree the character of a governor, that is, of a parent; as Augustine says to Count Marcellinus, *Christian judge, fulfil the office of a pious parent.* The Emperor Julian praises a speech of Pittacus; *who prefers pardon to punishment.* So Libanius says, that he who wishes to be like God, rejoices more in forgiveness than in punishing.

patris officium. Pittaci dictum laudat Julianus Imperator: ὃς τὴν συγγνώμην τῆς τιμωρίας προετίθει, *qui veniam pœnæ præferebat.* Libanius in oratione de seditione Antiochena: qui Deo, inquit, similis esse vult, ἀφιεὶς τιμωρίας χαιρέτω μᾶλλον ἢ λαμβάνων, *magis gaudeat condonatione quam pœna.* Orat. ii. p. 50 E.

3 Interdum eæ sunt rerum circumstantiæ, ut jure suo abstinere non laudabile tantum sit, sed et debitum, ratione ejus, quam hominibus etiam inimicis debemus dilectionis, sive in se spectatæ, sive qualiter eam exigit sanctissima lex Evangelii. Sic quosdam esse diximus, pro quorum, etiamsi nos impetant, salute mortem optare debeamus, quod eos sciamus rei communi humanæ aut necessarios aut valde utiles. Si res quasdam negligi vult Christus, ne lites subeantur, tanto credendum est majora a nobis negligi voluisse, ne ad bellum eatur, quanto bellum lite est nocentius.

Molin. *tract.* 11. *de Just. disp.* 103. Lorca *disp.* 153. n. 11. *Ægid. Reg. de act. supern. disp.* 31. *dub.* 7. n. 107.

τήσαντας ἐκ παντὸς τρόπου κολάζειν, ἀλλὰ τοὺς ἐπὶ τοῖς ἡμαρτημένοις μὴ μεταδιδασκομένους· non omnes omnino, qui deliquere, puniendi sunt, sed ii, quos male factorum nihil pœnitet. (E Lib. XXI. n. 17.) Chrysostomus *de Statuis* VI. (Tom. VI. p. 504. *Edit. Savil.*) μαθέτωσαν οἱ ἄπιστοι πάντες, ὅτι ὁ τοῦ Χριστοῦ φόβος πᾶσαν ἐξουσίαν δύναται χαλινοῦν. δόξασόν σου τὸν δεσπότην, τοῖς συνδούλοις ἄφες τὰ ἁμαρτήματα, ἵνα καὶ αὐτός σε δοξάσῃ μειζόνως, ἵνα ἥμερόν σοι κατὰ τὴν τῆς κρίσεως ἡμέραν δείξῃ τὸ ὄμμα καὶ γαληνὸν, ταύτης μεμνημένος σου τῆς φιλανθρωπίας· *discant omnes, qui a fide nostra sunt extranei, reverentiam, quæ Christo exhibetur, tantam esse, ut cuilibet potestati injiciat frænos. Honora dominum tuum: condona peccata conservis tuis, ut et ipse multo magis te honoret, ut in illo judicii die vultum tibi ostendat serenum atque clementem, hujus tuæ lenitatis memor.* Citat Gratianus causa XXIII. quæst. iv. ex Augustino, [aut potius Beda, in Galat. c. 6]: *duo ista nomina cum dicimus, homo et peccator, non utique frustra dicuntur: quia peccator est, corripe: quia homo, miserere:* vide et quæ sequuntur, et quæ supra posuimus ad caput XX. § 12. § 26. et 36.

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3 Sometimes the circumstances of the case are such, that to abstain from exercising one's right is not only laudable, but a duty; taking account of the kindness which we owe even to enemies, either considered in itself, or in the way in which the holy law of the Gospel requires it of us. And thus, we have said that there are some cases in which, even when we are attacked, we ought to prefer the salvation of the assailant, even to our own life, because we know him to be either necessary or extremely useful to the general interests of humanity. If Christ enjoins that some things are to be given up only to avoid strife, we must still more believe that he would have us give up greater things rather than go to war, since war is so much more hurtful than mere strife.

4 *De suo jure virum bonum aliquid relaxare non solum*
Lib. ii. *de Offic.* c. 21. *liberalitatis, sed plerumque etiam commoditatis est,* ait Ambrosius. Aristides suadet civitatibus συγχωρεῖν καὶ παριέναι ὅ, τι ἂν ᾖ μέτριον, *concedere et largiri, si quid sit mediocre.* Rationem addit: ὥσπερ γὰρ καὶ τῶν ἰδιωτῶν ἐπαινεῖτε τοὺς εὐγνώμονας καὶ βλαβῆναί τινα μᾶλλον αἱρουμένους ἢ διαφέρεσθαι πρός τινας· *nam et privatorum hominum eos laudatis, qui facili sunt ingenio, et damni aliquid subire malunt*
Cap. 3. § 4. *quam litigare.* Xenophon historiæ Græcæ sexto: σωφρόνων μὲν δήπου ἐστὶ, μηδὲ εἰ μὴ μικρὰ τὰ διαφέροντα εἴη, πόλεμον ἀναιρεῖσθαι· *sapientum est, ne ob graves quidem causas,*
Lib. i. 38. *bellum suscipere.* Et apud Philostratum Apollonius: πόλεμον οὐδ' ὑπὲρ μεγάλων αἴρεσθαι· *ne ob magnas quidem causas bellum capiendum.*

III. 1 Circa pœnas, officii primum nostri est, si non ut hominum, [d] certe ut Christianorum, ut facile ac libenter condonemus, quæ in nos sunt commissa, sicut Deus nobis condonat in Christo, *Eph.* iv. 32: τό γε περὶ τούτων ἀόργητον ὑπὲρ ὧν τὸ ζῆν ὑπεύθυνον τῇ κολάσει γίνεται τῶν ἠδικηκότων, Θεοῦ φύσει προσετέθη, ait [e] Josephus: *ira vacare circa ea, ob quæ nocentes pœnæ mortis sunt obnoxii, ad divinam naturam accedit.*

Lib. i. *de Clem.* 20. 2 Seneca de Principe: *Longe sit in suis quam in alienis exorabilior injuriis. Nam quemadmodum non est magni animi qui de alieno liberalis est, sed ille qui quod alteri*

[d] *Certe ut Christianorum*] Theodosius, ut Antiochenis condonaret crimen in se commissum, a Flaviano episcopo illis maxime Christi verbis permotus fuit: *dimitte illis, Pater, quia nesciunt quid faciunt.* Narrat Chrysostomus *de Statuis* vicesima. [Tom. VI. pag. 602. *Edit. Savil.*]

[e] *Josephus*] *Antiquæ Historiæ* Lib. II. (cap. VI. § 9. *division. Hudson.*)

[f] *Nec quicquam esse gloriosius principe impune læso*] Chrysostomus in laude clementiæ: ἅπαντα μὲν γὰρ ἄνθρωπον τοῦτο κοσμεῖν δύναται· διαφερόντως δὲ τοὺς ἐν ἐξουσίαις. τὸ γὰρ πάντα ποιεῖν ἐπιτρεπούσης τῆς βασιλείας, κατέχειν ἑαυτὸν, καὶ τὸν τοῦ Θεοῦ νόμον ἡγεμόνα ποιεῖσθαι τῶν ἔργων, μέ-

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4 So Ambrose says, that *for a good man to relax somewhat of his rights, is not only a point of liberality, but often of convenience.* So Aristides persuades cities to pardon and concede, if it be any moderate matter; adding the reason, *that even in private persons this is laudable.* So Xenophon, and Apollonius in Philostratus.

III. 1 With regard to punishments, it is, in the first place, our duty, if not as men, at least as Christians, to forgive willingly and freely offenses against us, as God in Christ forgives our offenses.

donat sibi detrahit: ita clementem vocabo non in alieno dolore facilem, sed eum, qui cum suis stimulis agitatur, non prosilit: qui intelligit, magni animi esse, injurias in summa potentia pati, [f] nec quicquam esse gloriosius principe impune læso. Quintilianus: *suadebimus principi, ut laudem humanitatis potius quam voluptatem ultionis concupiscat.* In C. Cæsaris laudibus posuit Cicero ut præcipuum, quod oblivisci nihil soleret nisi injurias. Livia in allocutione ad Augustum apud Dionem: τοὺς ἄρχοντας νομίζουσιν οἱ πολλοὶ τοὺς μὲν τὸ κοινὸν ἀδικοῦσιν ἐπεξιέναι χρῆναι, τοὺς δ' ἰδίᾳ τι εἰς αὐτοὺς πλημμελεῖν δοκοῦντας φέρειν· *ita plerique existimant, rectoribus punienda, quæ contra communem utilitatem peccantur; quæ vero in ipsos, dissimulanda.* [g] Antoninus Philosophus, in oratione ad Senatum: *non enim unquam placet in Imperatore vindicta sui doloris, quæ etsi justior fuit, acrior videtur.* Ambrosius in epistola ad Theodosium: *Antiochenis tuam donasti injuriam.* Et in ejusdem Theodosii laudibus ad senatum Themistius: ὅτι οὐκ ἀντιβλάπτοντα χρὴ τὸν ἀγαθὸν βασιλέα, ἀλλ' εὖ ποιοῦντα μείζω φαίνεσθαι τῶν ἠδικηκότων· *bonum regem oportet his qui in se peccarunt superiorem esse, non vicissim nocendo, sed bene faciendo.*

Inst. Orat. v. 13. *Orat. pro Ligar.* c. 12. Lib. lv. p. 643 c. *Epist.* 29. *in fin.* *Orat.* v. p. 137.

3 Magnanimus qui sit, cum Aristoteles negat esse μνησίκακον, *injuriarum memorem:* quod Cicero sic exprimit: *nihil magno et præclaro viro dignius placabilitate atque clementia.* Hujus eximiæ virtutis insignia nobis exempla sacræ literæ

Ethic. Nic. iv. 8. *De Offic.* i. 25.

γα μὲν εἰς εὐφημίαν τε καὶ δόξαν· *omnem illa hominem ornare insigniter potest: maxime vero eos, qui in imperiis sunt constituti: nam cum regia potestas omnia permittat, semet retinere, ac divinam legem actionibus suis ducem præficere, egregium est ad famam gloriamque.* (Tom. VI. pag. 753, 754.) Augustinus epist. CIV. quæ est ad Bonifacium comitem: *memento cito ignoscere, si quis in te peccaverit et veniam postulaverit.* (Epist. 205. vulg. 189. autem § 8. *division. Benedictin.*)

g *Antoninus Philosophus*] Apud Vulcatium Gallicanum *vita Avidii Cassii.* (cap. 12.)

Eph. iv. 32. So Josephus.

2 So Seneca characterizes a prince, that he forgives his own injuries more easily than those of others; so Quintilian; and Cicero of Cæsar, that he forgot nothing but injuries. So Livia in her address to Augustus in Dio: Antoninus the philosopher: Ambrose to Theodosius; Themistius in praise of the same Theodosius.

3 Aristotle makes it a character of the magnanimous man, not to remember evil done to him; which Cicero copies. The Scripture gives us great examples of this virtue in Moses and David. [See] This

suppeditant in Mose, Num. xi. 12 et Davide, 2 Sam. xvi. 7.
Dried. ii. *de Lib. Christ.* c. 6. Maxime vero id locum habet, ubi aut nos quoque nobis peccati alicujus sumus conscii, aut id quod in nos peccatum est ab humana quadam et excusabili infirmitate procedit, aut satis apparet pœnitere eum, qui nocuit. *Est ulciscendi et puniendi* *De Offic.* i. 11. *modus*, inquit Cicero, *et haud scio, an satis sit*, [h]*eum, qui lacessierit, injuriæ suæ pœnitere. Sapiens*, inquit Seneca, *De Clem.* ii. 7. *multa remittit; multos parum sani, sed sanabilis ingenii servabit.* Et hæ quidem causæ a bello abstinendi ex dilectione nascuntur, quam ipsis inimicis aut debemus, aut recte impendimus.

IV. 1 Sæpe vero [i]nobis ipsis nostrisque præstandum p. 68 B. habemus, ne ad arma veniatur. Plutarchus in Numæ vita ait, postquam juste posse suscipi bellum decrevissent feciales, [k]consultatum a senatu an ex usu esset suscipere. In parabola *Luc.* xiv. 31. quadam Christi dicitur, siquis rex cum rege altero bello certandum habeat, primo sedentem, qui mos est cum cura consultantium, expensurum apud se, an ipse, qui decem millia militum habeat, hosti ducenti bis totidem par esse possit;

[h] *Eum qui lacessierit injuriæ suæ pœnitere*] Procopius *Vandalicorum* II. (Cap. 16.) *μετάμελος γὰρ ἐν δέοντι ἐπταικόσιν ἐπιγιγνόμενος, συγγνώμονας αὐτοῖς τοὺς ἠδικημένους ποιεῖν εἴωθεν· pœnitentia in tempore oboriens iis qui peccarunt ad veniam dandam provocare læsos solet.*

[i] *Nobis ipsis nostrisque*] Procopius *Gotthicorum* II Gotthos ita ait locutos Belisario: *ὅταν δὲ αὐτὰ οὕτως ἔχῃ, τοὺς ἑκατέρων ἡγουμένους προσήκει μὴ δόξης τῆς οἰκείας τὴν τῶν ἀρχομένων σωτηρίαν προΐεσθαι, ἀλλὰ τά τε δίκαια τά τε ξύμφορα, οὐ σφίσιν αὐτοῖς μόνον, ἀλλὰ καὶ τοῖς σφῶν ἐναντίοις ἑλέσθαι· hæc cum ita se habeant, officium erit utriusque gentis rectorum, subditorum sibi salutem non projicere propriæ laudis studio, sed ea præferre, quæ et*

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holds especially when we are ourselves conscious of some wrong; or when the wrong done us proceeds from some human and excusable infirmity; or when it is evident that he who has done the wrong is penitent. So Cicero, and Seneca. And so far, of the causes of abstaining from war, which arise from the kindness which we either owe to enemies, or rightly bestow upon them.

IV. 1 Often also it is a duty which we owe to ourselves, and those who depend upon us, not to recur to arms. Plutarch, in the life of Numa, says that when the Feciales had decided that war might be undertaken justly, he consulted the Senate whether it was advantageous to enter upon it. In one of Christ's parables, we are told that when a king, going to make war, finds that his forces are inferior to those of his enemy, he desires conditions of peace. Luke xiv. 31.

2 So the Tusculans, bearing everything and refusing nothing,

quod si videat se imparem fore, antequam ille intra fines adsit, missurum legationem cum mandatis pacis causa.

2 [l]Sic Tusculani omnia patiendo, et [m]nihil recusando pacem a Romanis meruerunt. Apud Tacitum est: *frustra adversus Æduos quæsita belli causa. Jussi pecuniam atque arma deferre, gratuitos insuper commeatus præbuere.* Sic [n]legatis Justiniani Amalasuntha regina negavit armis se certaturam. Liv. vi. 26. *Hist.* i. 64.

3 Potest et temperamentum adhiberi, ut a Syrmo Triballorum rege factum Strabo memorat, qui Alexandrum Macedonem et insulam Peucen intrare vetuit, et simul donis cum honoravit, ut ostenderet se, quod faceret, justo metu, non odio aut contemptu ipsius facere. Quod Euripides de Græcis dixit civitatibus, idem ad alios quosvis recte aptes: Lib. vii. p. 301. *Supplic.* v. 481. *et seqq.*

De Marte quoties itur in suffragia,
Nemo imminere cogitat mortem sibi:
Sed quisque cladem destinamus alteri:
Quod si in comitiis funera ante oculos forent,
Furiata bello non perisset Græcia.

justa sunt et utilia, non ipsis tantum, sed et hostibus. (Cap. 6.)

[k] *Consultatum a senatu, an ex usu esset suscipere*] Diodotus apud Thucydidem III. (cap. 44) *ἤντε γὰρ ἀποφήνω πάνυ ἀδικοῦντας, οὐ διὰ τοῦτο καὶ ἀποκτεῖναι κελεύσω, εἰ μὴ ξυμφέρον· etiamsi enim maxime illos peccasse pronuntiem, non utique et occidi eos jubebo, nisi expediat.*

[l] *Sic Tusculani*] Vide Plutarchum *Camillo* (pag. 149.)

[m] *Nihil recusando*] Fecit idem Armeniorum rex Severi tempore: meminit Herodianus libro III. (Cap. 9. num. 3. *Ed. Bœcler.*)

[n] *Legatis Justiniani Amalasuntha*] Vide Procopium *Vandalicorum* II. et (cap. 5) et *Gotth.* I. (cap. 3.)

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obtained, by their merit, peace from the Romans. So Tacitus says of the Eduans, that a cause of war against them was sought in vain, for they did more than was demanded of them. So queen Amalasuntha told the ambassadors of Justinian that she would not contend with him in arms.

3 There may be also a moderation exercised in such cases, as Strabo relates of Syrmus king of the Triballi, who forbad Alexander of Macedon to enter the island of Peuce, and at the same time sent presents to him; shewing that what he did was done from a reasonable fear of the consequences, not from dislike or contempt of him. What Euripides said of the Greek cities, you may apply to any other parties; that if men could foresee the evils which war produces to themselves, they would avoid such a course. So Livy, and Thucydides.

Lib. xxx. 30. Apud Livium est: *cum tuas vires, tum vim fortunæ, Martemque communem propone animo.* Lib. i. 78. Et apud Thucydidem: *τοῦ πολέμου τὸ παράλογον ὅσον ἐστὶ, πρὶν ἐν αὐτῷ γενέσθαι, προδιάγνωθι· quicquid inopinum accidere potest in bello, priusquam aggrediare, considera.*

V. 1 Qui deliberant, partim de finibus, non quidem ultimis, sed interjectis deliberant, partim de iis, quæ eo ducunt. Finis semper est bonum aliquod, aut certe mali declinatio, quæ vicem boni obtinere possit. Quæ vero huc aut illuc ducunt, per se non expetuntur, sed quatenus ducunt: quare in deliberationibus comparandi sunt, et fines inter se, et eorum quæ ad finem ducunt, facultas effectiva ad finem producendum: Cap. 7. nam, ut recte dixit Aristoteles de animalium motione, *αἱ προτάσεις αἱ ποιητικαὶ διὰ δύο εἰδῶν γίγνονται, διά τε τοῦ ἀγαθοῦ καὶ διὰ τοῦ δυνατοῦ, propositiones, quæ actionem efficiunt, duorum sunt generum, ab eo quod bonum est, et ab eo quod fieri potest:* quæ comparatio tres habet [2] normas.

2 Prima est; si res, de qua agitur, æqualem, morali scilicet æstimatione, efficaciam habere videatur ad bonum et ad malum: ita demum eligenda est, si bonum aliquanto plus habeat boni quam malum mali. Orat. I. De Pace, Tom. II. p. 63 B. Hoc est, quod Aristides sic enuntiat: *ὅτ' ἔλαττον τοῦ δυσχεροῦς τὸ ἀγαθὸν, κρεῖττον*

[2] Harum regularum explicationem vide apud PUFENDORFIUM, *De Jur. Nat. ac Gent.* Lib. I. cap. 2. § 7. *J. B.*

[o] *Si efficacia ad bonum major sit collata efficaciæ ad malum, quam ipsum malum est collatum bono*] Utitur hac

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V. 1 Those who deliberate in such cases, deliberate partly concerning the ends, not the ultimate, but the intermediate ones, and partly, concerning the means which lead to the ends. The end is always some good, or at least the avoidance of evil, which may stand in the place of good. The means which lead to ends are not sought on their own account, but as they lead to the end. Therefore in our deliberations we must compare ends with one another, and the efficacy of the means to produce the end: as Aristotle says of the motions of animals.

There are three rules for such comparisons.

2 The first rule is, if the thing in question seems, in moral estimation, to have an efficacy both for good and for evil; it is to be chosen only if there is more of good in the good consequences than of evil in the evil. So Aristides and Andronicus Rhodius.

3 The second rule is, if the good and the evil which may proceed from the thing be equal; it is to be chosen if the efficacy be greater for the good than for the evil.

ἐνήλλαχθαι. Andronicus Rhodius, ubi magnanimum describit, ait, cum non ob quasvis causas pericula subiturum, sed ob maximas. Lib. iv. 5. p. 219.

3 Altera; si videatur esse æquale bonum et malum, quod a re, de qua quæritur, possit procedere: ita demum ea res eligenda est, si efficacia ad bonum quam ad malum major sit.

Tertia, si videatur et bonum et malum esse inæquale, nec minus inæqualis rerum efficacia: res ea ita demum eligenda est, [2]si efficacia ad bonum major sit collata efficaciæ ad malum, quam ipsum malum est collatum bono; aut si bonum sit majus comparatione mali, quam efficacia ad malum comparata efficaciæ [3]ad bonum.

4 Hæc nos limatius paulo; sed eodem tendit via planiore Cicero: cum ait, fugiendum, ne offeramus nos periculis sine causa, quo nihil potest esse stultius: quapropter in adeundis periculis consuetudinem imitandam medicorum, qui leviter ægrotantes leviter curant, gravioribus autem morbis periculosas curationes et ancipites adhibere coguntur: quare subvenire tempestati sapientis esse dicit, eoque magis si plus adipiscare re explicata boni quam addubitata mali. De Offic. i. 24.

5 Et alibi: *Ubi ἐπίτευγμα magnum nullum fieri possit, ἀπότευγμα vel non magnum nociturum sit, quid opus est* Epist. ad Attic. xiii. 27.

regula prudenter Narses apud Procopium *Gotthicorum* II. (cap. 18.)

[3] Vocem illam *efficaciæ*, quam in omnibus Editionibus manifesto deesse dudum observaveram, in Not. ad modo dictum Pufendorfii locum, fidenter restitui. *J. B.*

The third rule is, if the good and the evil be unequal, and the efficacy to the one and the other also unequal; the thing is to be chosen, if the efficacy to good compared with the efficacy to evil be greater than the evil is compared with the good; or if the good compared with the evil be greater than the efficacy of the means for evil compared with its efficacy for good.

4 We have stated this somewhat formally. Cicero comes to the same result by a plainer way, when he says, that we are to avoid incurring danger without cause, than which nothing can be more foolish; wherefore, in incurring dangers, we are to imitate the practice of physicians, who, when men have a slight disease, cure them by slight means; but in more grave diseases, are compelled to apply dangerous and doubtful remedies. Whence, he says, the wise man must watch the occasion, and the more so, if you gain more good by the plain way than you can avoid evil by the doubtful way.

5 So Cicero in an Epistle to Atticus, Dio Prusæensis, Aristides.

Pag. 416 D. *παρακινδυνεύειν?* Dion Prusæensis Tarsensi altera: *ἔστω δεινὸν καὶ ἄδικον. ἀλλ' οὐκ εἴ τι μὴ δίκαιον πέφυκε γίνεσθαι, δεῖ πρὸς τοῦτο φιλονεικοῦντας αὑτοὺς περιβάλλειν ἀτόπῳ τινί· sit sane hoc injustum et indignum, quod toleretur. At non, si quid injusti accidit, nos ideo debemus certandi studio nosmet incommodis objicere.* Et postea: *ὥσπερ, οἶμαι, τὰ βάρη ταῦτ' ἂν μὲν σφόδρα πιέζῃ καὶ ἀνέχεσθαι μὴ δυνώμεθα, ζητοῦμεν ὡς τάχιστα ἀποῤῥίψαι· μετρίως δὲ ἐνοχλούμενοι καὶ ὁρῶντες ἀνάγκην οὖσαν φέρειν ἢ τοῦτο, ἢ τούτου μεῖζον ἕτερον, σκοποῦμεν ὡς κουφότατα ἕπεσθαι· sicut onera, ubi ita valde nos urgent, ut durare nequeamus, quærimus abjicere: mediocriter autem pressi, et rebus talibus, ut aut ista aut graviora ferenda sint, in hoc nos componimus, ut quam*
Tom. II. p. 52 D. *expeditissime subsequamur.* Aristides Sicula secunda: *ὅτε μείζων ὁ φόβος τῆς ἐλπίδος, πῶς οὐκ ἄξιον φυλάττεσθαι· ubi major spe metus est, quomodo non tempus est cavendi?*

VI. 1 Exemplum sumamus ab eo, quod inter Galliæ
Hist. iv. 67. civitates consultatum olim narrat Tacitus: *libertas an pax placeret.* Libertatem intellige civilem, hoc est, jus regendæ per se reipublicæ: quod jus plenum est in statu populari, temperatum in statu optimate, præsertim tali, ubi nemo civium ab honoribus arceatur. Pacem vero talem, qua bellum redimatur
Lib. ix. *ep. ad Att.* 4. internecinum, id est, ut Cicero alibi Græcis verbis hanc quæs-

p *In servitutem dedant, ne fame ac peste moriantur*] Guido Blandratensis in oratione ad Mediolanenses apud Guntherum. (Lib. VIII. vers. 155, *et seqq.*)

Omnia securi pro libertate feremus.
Sed libertatem contemta nemo salute
Sanus amat neque enim certæ susceptio cladis,
Quam vitare queas, nisi cum ratione salutis,
Libertatis amor, sed gloria vana putanda est.

VI. 1 Let us take an example from a deliberation which, as Tacitus relates, was held among the cities of Gaul, *whether they would try for Liberty or for Peace:* where, by Liberty, we are to understand Civil Liberty, that is, the right of governing themselves: which right is plenary in a popular state, limited in an aristocracy, especially in one in which no one of the citizens is excluded from honours; and by Peace, we are to understand such a one as is the alternative of an internecine war, or as Cicero says, quoting Greek, where the question is about endangering the whole fortunes of the State; where nothing less than the destruction of the whole people is portended; as was the condition of Jerusalem besieged by Titus. In such a case, what Cato would have said, who chose to die rather than submit to the rule of one man, every one knows: as Lucan says in that case, *It is an easy exercise of virtue to escape slavery by our own hand;* and many other things in the same strain.

tionem explicat, ἐὰν μέλλῃ διὰ τοῦτο περὶ τῶν ὅλων ἡ πόλις κινδυνεύειν· Puta, ubi recta æstimatio futuri nihil ferme aliud quam totius populi exitium videatur portendere: qualis erat status Hierosolymorum obsessorum a Tito. Hic Cato quid dicturus sit, qui mori quam uni parere maluit, nemo nescit; quo et illud pertinet:

Quam sit non ardua virtus Lucan. iv. 576.
Servitium fugisse manu.

Et multa alia ad eum modum.

2 At aliud dictat recta ratio: vitam scilicet, quæ fundamentum est omnium bonorum temporalium et æternorum occasio, pluris esse quam libertatem; sive utrumque sumas in uno homine, sive in toto populo. Itaque Deus ipse pro beneficio imputat, quod non perdat homines, sed in servitutem tradat. 2 *Paral.* xii. 7, 8. Et alibi suadet per Prophetam Hebræis, ut sese Babyloniis *Jer.* xxvii. 13. [p]in servitutem dedant, ne fame ac peste moriantur. Quare illud quamquam laudatum antiquis,

Obsessum Pœno gessit quod Marte Saguntum: Lucan. iii. 350.

laudandum non est, nec quæ eo ducunt. August. *de Civ. Dei*, xxii. 6.

3 Internecio enim populi in hoc rerum genere pro maximo malo haberi debet. Cicero *de Inventione* secundo necessitatis Cap. 57. hoc ponit exemplum, necesse esse Casilinenses se dedere Annibali, quanquam necessitati aderat hæc adjunctio [q]nisi malint

[q] *Nisi malint fama perire*] Anaxilai, qui ob famem Byzantium dediderat, hæc defensio fuit: pugnandum hominibus in homines, non in rerum naturam: ita Xenophon. Procopius *Gotth.* IV. (cap. 12) οὐ γὰρ ἐπαινοῦσι τὴν ἑκούσιον τελευτὴν ἄνθρωποι, ἔνθα τις ἐπίκειται κρείσσων τοῦ κατ' αὐτὴν κινδύνου ἐλ-

2 But right reason dictates another course; namely, that life, which is the foundation of all temporal and the occasion of eternal good, is of more value than liberty; whether you take the alternative in a single man or in a people. And so God himself speaks of it as a benefit, that he does not destroy men, but delivers them into slavery; 2 Chron. viii. 7, 8, [of the remnant of the Canaanites spared by Solomon.] And in another place he, by the Prophet, persuades the Jews to submit to servitude under the Babylonians, that they may not die of famine and pestilence, Jer. xxvii. 11. And therefore the act of the Saguntines [who destroyed themselves in their city rather than yield it], though praised by the ancients, is not to be praised by us; nor the courses which lead to it.

3 For the destruction of a people, in questions of this kind, is to be held as the greatest of evils. Cicero puts this as an example of necessity, that it was necessary for the Casilinenses to surrender to

fame perire. De Thebanis, qui Alexandri Macedonis tempo-
Lib. xvii. 10. ribus vixerunt, exstat hoc Diodori Siculi judicium: *τοῖς παραστήμασιν ἀνδρειότερον μᾶλλον ἢ φρονιμώτερον χρησάμενοι προέπεσον εἰς πάνδημον τῆς πατρίδος ὄλεθρον· animi* [r] *spiritu forti magis quam prudente internecionem patriæ accersiverunt.*

4 De eo, quem diximus, Catone et Scipione, qui post victoriam Pharsalicam cedere Cæsari noluerunt, judicium ex-
In Othon. p. 1072 D. stat apud Plutarchum: *αἰτίαν ἔχουσιν ὡς πολλοὺς καὶ ἀγαθοὺς ἄνδρας ἐν Λιβύῃ παραναλώσαντες οὐκ ἀναγκαίως· culpandi sunt tanquam qui viros multos et egregios in Africa perdiderint, nullo operæ pretio.*

5 Quod autem de libertate dixi, idem de aliis rebus expetibilibus dictum volo, si oppositi mali majoris justior aut par
Orat. Plat. ii. p. 283 B. Tom. III. sit exspectatio. Nam, ut recte Aristides, moris est, navem servare rerum, non vectorum jactu.

VII. In pœnis quoque exigendis illud maxime observandum est, ne unquam eo nomine bellum suscipiatur in eum cui

πῖς· non laudant mortem voluntariam homines, quamdiu spes aliqua est periculo potentior. [Dictum, quod Auctor noster tribuit Anaxilao, non legitur apud Xenophontem, eo loco ubi Historia illa narratur, *Hist. Græc.* Lib. I. cap. 3. § 12. Confudit forte Auctor, quod a Cyro dictum refert idem, Cyrip. Lib. VI. c. 1. § 10. *J. B.*]

[r] *Spiritu forti magis quam prudente*] Idem cum explicasset consilia belli suscepti ab Atheniensibus post Alexandri mortem, ait, saniorum judicio eos *πρὸς εὐδοξίαν οὖ βεβουλεῦσθαι· τοῦ δὲ συμφέροντος διημαρτηκέναι. ad gloriam quidem recte consuluisse, sed ab utilitate*

Annibal; although they had the alternative of perishing by hunger. We have this judgment of Diodorus, concerning the Thebans of the time of Alexander of Macedon, that they were more brave than prudent, in bringing destruction upon their country.

4 Concerning Cato, of whom we have spoken, and Scipio, who after the victory of Pharsalia would not yield to Cæsar, we have Plutarch's judgment, that they were to be blamed for having caused the destruction of many brave and excellent men in Egypt, for no valuable purpose.

5 What I have said of liberty, I would have understood also of other desirable objects, if the expectation of a greater opposite evil be more just, or be equal. As Aristides said, men are accustomed to save the ship by throwing overboard, not the passengers, but the cargo.

VII. Again, in exacting punishment, that is especially to be observed; that we are never on such ground to engage in war with one who is as strong as ourselves. For as a civil judge ought to be much more powerful than the criminal, so must he be who undertakes

pares sunt vires. Nam ut judicem civilem, ita qui armis facinora velit vindicare, multo esse validiorem altero oportet: neque vero prudentia tantum, aut suorum caritas exigere solet, ut bello periculoso abstineatur, sed sæpe etiam justitia, rectoria scilicet, quæ ex ipsa regiminis natura superiorem non minus ad curam pro inferioribus, quam inferiores ad obedientiam obligat. Cui consequens est id, quod recte a theologis est traditum, regem qui ob causas leves, aut ad exigendas poenas non necessarias, et magnum secum periculum trahentes, bellum suscipit, teneri subditis ad reparationem damnorum, quæ inde oriuntur: nam etsi non in hostes, in suos tamen veram committit injuriam, qui talibus de causis tam gravi malo eos implicat. Livius: *justum bellum quibus necessarium, et pia arma quibus nulla nisi in armis relinquitur spes.* Optat hunc statum Ovidius *Fastorum* I. (vers. 715):

Cajet. 2. 2. q. 95. art. 8. Molin. *tract.* 1. *de Just.* c. 102.

Lib. ix. 1.

Sola gerat miles, quibus arma coërceat, arma.

VIII. [s] Rara ergo belli sumendi causa est, quæ omitti aut non possit aut non debeat, puta cum jura sunt, ut Florus

Lib. iv. 12. n. 32.

aberrasse: ut ut qui properassent διακινδυνεύειν μηδεμιᾶς ἀνάγκης κατεπειγούσης· *periclitari nulla necessitate impellente:* ne Thebanorum quidem tam nobili clade passi se admoneri. (Lib. XVIII. c. 10.)

[s] *Rara ergo belli sumendi causa est, quæ omitti aut non possit aut non debeat*] Servius ad illud in x. *Æneidos*, (vers. 758):

Iram miserentur inanem
Amborum, et tantos mortalibus esse labores.

Quia nulla causa tam justa est, ut propterea bellum geri debeat.

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to punish crimes by arms. And not only does prudence and charity for those who are dependent upon us require us to abstain from a perilous war, but often justice also, that is, rectorial justice; which, from the very nature of government, binds the superior to care for the inferiors, no less than the inferiors to obey the superior. From which it follows, as theologians have observed, that a king who undertakes wars for light causes, or for the purpose of exacting punishments which are not necessary, and which bring great danger with them, is bound to his subjects for reparation of the loss thence arising to them; for if he do no injury to the enemy, he does one to his own subjects, when, for such causes, he implicates them in so great evils. As Livy says, war is just, when it is necessary; *their* arms are pious, who have no hope left except in arms. This is what Ovid wishes:

No arms be borne save those which put down arms.

VIII. Thus the cases are rare, in which war, either may not or ought not to be avoided; in cases only when, as Florus speaks, the enforcement of rights is worse than arms. Seneca says, *We may*

[[Lib. i. *de Clement.* c. 12.]] loquitur, armis sæviora. Seneca *incurri*, ait, *in pericula, ubi quiescenti paria metuuntur*, aut etiam pejora: quem *Orat.* 1. *De Pace*, Tom. II. p. 67 B. sensum Aristides sic extulit: τότε χρὴ κἂν ἄδηλον ᾖ τὸ μέλλον αἱρεῖσθαι κινδυνεύειν, ὅταν τὸ τὴν ἡσυχίαν ἄγειν φανερῶς χεῖρον ᾖ· *miseram pacem bello bene mutari*, ait *Hist.* iv. 32. Tacitus, nempe cum, ut idem ait, *aut ausos libertas sequetur,* Lib. x. 16. *aut victi iidem erunt:* aut *ubi* (ut Livius loquitur) *pax servientibus gravior quam liberis bellum.* Non si, ut apud *Ad Att.* vii. 7. Ciceronem est, apparet futurum, ut, si victus eris, proscribaris: si viceris, tamen servias.

IX. Alterum belli tempus, si, ita ut oportet, rem æstimanti, a jure, et quidem quod momenti sit maximi, simul Suet. c. 25. stent vires. Hoc est, quod Augustus aiebat, bellum non suscipiendum, nisi cum major emolumenti spes quam damni metus ostenderetur. Et quod de prælio dicere solebant Scipio Afri- Gell. xiii. 3. Val. Max. vii. 2. canus et L. Æmilius Paulus, idem huc non male aptaveris: *non decertandum esse,* [t]*nisi summa necessitudo aut summa occasio data esset.* Locum autem tum maxime hoc habebit,

[t] *Nisi summa necessitudo*] Plutarchus *Gracchis:* τὸ ἄνευ τῆς ἐσχάτης ἀνάγκης ἐπιφέρειν σίδηρον, οὔτε ἰατρικὸν, οὔτε πολιτικόν· *extra summam necessitatem ferrum inferre, nec boni medici est, nec boni præsidis.* (Pag. 845 A.) Marciani dictum apud Zonaram: μὴ δεῖν ὅπλα βασιλέα κινεῖν, ἕως εἰρηνεύειν ἐξόν· *non debere regem arma movere, quamdiu pace frui liceat.* (Lib. XIII. cap. 25. fin.) Augustinus L. epistola ad Bonifacium: *pacem habere voluntatis est: bellum autem debet esse necessitatis, ut liberet Deus a necessitate et conservet in pace.* [Ubi legitur: *Pacem habere debet voluntas, bellum necessitas.* Epist. XCV. vulg. 189. § 6. *Ed. Benedictin.*]

[u] *Terrore ac fama*] *Leo spernens tela diu se terrore solo tuetur, ac velut cogi testatur.* Habet id Plinius *Historiæ Naturalis* VIII. cap. 16.

[x] *Utique dolenda*] Lacedæmonii in oratione, quæ exstat apud Diodorum Siculum, libro XIII. (cap. 52) θεωροῦντες τὰς ἐν τῷ πολέμῳ φιλονεικίας πολλὰ καὶ δεινὰ πάθη ποιούσας, οἰόμεθα δεῖν φανερὸν ποιῆσαι πᾶσι καὶ θεοῖς καὶ ἀνθρώποις, ὅτι τούτων ἥκιστα πάντων ἐσμὲν αἴτιοι· *cum videamus, ex*

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run into danger, when we have as much to fear if we sit still: so Aristides. This Tacitus puts, by saying that *A miserable peace is well changed for war;* where, as he also says, *Liberty may crown the attempt, and defeat will leave them no worse.* So Livy: but not when the pretence is as Cicero describes it; If you are conquered you are proscribed; if you are victorious you are a slave.

IX. Then only is the time for war, when we have right on our side, and, what is of the greatest consequence, strength also. This is what Augustus said, that war was not to be undertaken except when there could be shewn more hope of gain than fear of loss. What Scipio Africanus and Emilius Paulus said of a battle, may be ap-

cum spes est, [u]terrore ac fama, nullo aut exiguo periculo rem confici posse: quale erat Dionis consilium ad liberandas Syracusas. In epistolis Plinii est: *quod est pulcherrimum victoriæ genus, terrore perdomuit.* Diod. xvi. 17. Lib. ii. Ep. 7.

X. 1 Sæva res bellum est, inquit Plutarchus, cumulumque secum trahit injuriarum et insolentiæ. Et sapienter Augustinus: *quorum malorum* (de his loquitur, quæ ex bello nascuntur) *multas et multiplices clades, diras et duras necessitates, si, ut dignum est, eloqui velim, quamquam nequaquam, sicut res postulat, possum, quis erit prolixæ disputationis modus? sed sapiens, inquiunt, justa bella gesturus est: quasi non, si se hominem meminit, multo magis dolebit justorum necessitatem sibi exstitisse bellorum: quia nisi justa essent, ei gerenda non essent: ac per hoc sapienti nulla bella essent. Iniquitas enim partis adversæ justa bella ingerit gerenda sapienti, imo et necessaria: quæ iniquitas homini* [x]*utique dolenda, quia hominum est, et si nulla ex eo bellandi necessitas nascatur. Hæc itaque mala* Vit. Camill. p. 134 B. De Civ. Dei, xix. 7.

bello plurimas inimicitias, plurima atrocia oriri, nostri officii duximus cunctis Diis hominibusque testatum facere, causam horum a nobis non esse. Plutarchus *Numa*, (pag. 78 B.) τί οὖν, φήσει τις, οὐκ ἐπὶ τὸ βέλτιον προῆλθεν ἡ Ῥώμη τοῖς πολέμοις; ἐρωτῶν ἐρώτημα μακρᾶς ἀποκρίσεως δεόμενον, πρὸς ἀνθρώπους τὸ βέλτιον ἐν πλούτῳ, καὶ τροφῇ, καὶ ἡγεμονίᾳ, μᾶλλον ἢ σωτηρίᾳ καὶ πραότητι καὶ τῇ μετὰ δικαιοσύνης αὐταρκείᾳ τιθεμένους· *hic si quis mihi dixerit, nonne Roma per bella profecit plurimum, quæstionem moverit longæ responsionis egentem, apud homines, qui profectum ponunt in opulentia, in deliciis, in imperiis militaribus, non in salute populi, in lenitate, in justitia suo contenta.* Stephanus medicus Chosroi Persarum regi apud Procopium *Persicorum* II. οὐκοῦν, ὦ κράτιστε βασιλεῦ, φόνους σοι καὶ μάχας ἐργαζομένῳ καὶ πόλεων ἀνδραποδισμούς, τῶν μὲν ἄλλων ἴσως ὀνομάτων παρέσται τυχεῖν. τὸ δὲ ἀγαθῷ εἶναι δοκεῖν, οὐ μήποτε ἔσται· *tibi, rex maxime, in cædibus et pugnis et urbibus subigendis occupato alia forte nomina contingant, bonus autem ut per hæc credaris, fieri nequit.* (Cap. 26.) Adde locum egregium

plied to war in general; that *We ought never to fight except there were either the greatest necessity or the greatest occasion.* And this is especially true, when there is a hope that the matter may be brought to an issue merely by terror and by the reputation of strength, with little or no danger. Pliny says, *He gained the most brilliant kind of victory, conquering by terror.*

X. 1 War, says Plutarch, is a dire business, and brings with it an accumulation of injuries and cruelty. And Augustine says wisely, that this being so, the wise man will not be satisfied merely if the war is just; he will grieve that there should be a necessity for just wars; since, except they were just, he would not go to war; and in

tam magna, tam horrenda, tam sæva quisquis cum dolore considerat, miseriam necesse est fateatur: quisquis autem vel patitur ea sine animi dolore, vel cogitat, multo utique miserius ideo se putat beatum, quod et humanum perdidit sensum. Idem alio loco: *belligerare malis videtur felicitas, bonis necessitas.* Maximus autem Tyrius: τῆς τοῦ πολεμεῖν χρείας κἂν ἀφέλῃς τὸ ἄδικον, ἐλεεινὸν αὐτῆς τὸ ἀναγκαῖον· *de bello etiamsi demas injustitiam, ipsa per se necessitas miseranda est.* Idem: φαίνεται ὁ πόλεμος τοῖς μὲν δικαίοις ἀναγκαῖος ὤν, τοῖς δὲ ἀδίκοις ἑκούσιος· *apparet bellum a justis non sumi nisi necessario, ab injustis sponte.*

Lib. iv. *de Civ. Dei*, c. 15. *Dissert.* 14. p. 146.

Epist. 88. Ælian. xiv. 11.

2 Cui Senecæ illud addendum, non esse homini homine prodige utendum. Philiscus Alexandrum monebat, ut gloriæ quidem studeret, sed ea lege, ne se pestilentiam aut magnum

Guicciardini libro xvi. (in Oratione Episcopi *Osim.*)

y *Quod multum sanguinem fudisset*] Οὐκ ἐπιτρέπει δὲ πολλοὺς πολέμους ἠγωνισμένῳ καὶ φόνῳ τῶν ἐχθρῶν μεμιασμένῳ· *non permisit templum struere ei qui multa bella bellasset, pollutusque esset, hostili quidem, attamen sanguine.* Verba sunt Josephi libro vii. cap. 4. ubi et plura in hanc sententiam sequuntur. Plinius libro vii. cap. 25. post relata Cæsaris Dictatoris prælia: *non equidem in gloria posuerim tantam etiam coactam humani generis injuriam.* Philo *de Vita Mosis*: καὶ γὰρ εἰ νόμιμοι αἱ κατ' ἐχθρῶν σφαγαὶ, ἀλλ' ὅγε κτείνων ἄνθρωπον, εἰ καὶ δικαίως καὶ ἀμυνόμενος καὶ βιασθεὶς, ὑπαίτιος εἶναι

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this very way, there would be no wars. The iniquity of men may make wars just, and even necessary; but this iniquity is a thing to be lamented, even if it did not lead to war. Whoever considers the evils of war, must confess the miseries of the case; who suffers it without grief, is more miserable in his joy, because he has lost the sense of humanity. And in another place, *The bad think war a pleasure, the good, a necessity.* So Maximus Tyrius.

2 To which we must add what Seneca says, that man is not to use man prodigally. Philiscus admonished Alexander, that he might consult his glory, but on condition that he did not make himself a pestilence or a plague: meaning that he must not bring about the destruction of populations and the desolation of cities, such as a pestilence produces: while nothing more becomes a king, than to provide for the safety of all, as peace does provide.

3 When we consider that by the Hebrew law he who had slain a man, even without intending it, was obliged to fly; that God forbade his temple to be built by David, who is related to have carried on pious wars, because he had shed much blood; that even among the ancient Greeks, those who had stained their hands with man-

morbum faceret: intelligens populorum occidionem, desolationem urbium, pestilentiæ esse opera: nihil autem magis esse regium quam consulere omnium saluti, quæ pace continetur.

3 Si jure Hebræo et qui non volens hominem occidisset fugere debebat: si Deus a Davide, qui pia bella gessisse dicitur, ideo templum suum ædificari vetuit [y] quod multum sanguinem fudisset: si apud Græcos veteres expiatione opus habebant etiam qui sine culpa manum cæde maculassent: quis non videat, præsertim Christianus, quam res sit infelix et mali ominis, quantoque nisu fugiendum bellum etiam non injustum? Certe apud Græcos Christianismum professos diu observatus est canon, quo sacris [z] ad tempus arcebantur qui hostem in qualicumque bello interfecissent.

Num. xxxv. *Deut.* xix. 1 *Chron.* xxviii. 3.

Basil. *ad Amphil. Epist.* I. 13.

δοκεῖ διὰ τὴν ἀνωτάτω καὶ κοινὴν συγγένειαν· οὗ χάριν καθαρσίων ἐδέησε τοῖς κτείνασι πρὸς ἀπαλλαγὴν τοῦ νομισθέντος ἄγους γεγενῆσθαι· quamvis enim legibus permissæ sint hostium occidiones, attamen quisquis hominem interfecerit, quamvis juste, quamvis ad sui tutelam, quamvis coactus, aliquid labis contraxisse creditur, propter illam communem a summa causa venientem cognationem. Quapropter et purgatione quadam opus habebant tales interfectores, ad eluendum quod commissum videbatur piaculum. (Pag. 650 E.)

[z] *Ad tempus*] Triennio. Zonaras Nicephoro Phoca. (Lib. XVI. cap. XXV. pag. 203. Tom. II. *Ed. Reg.*)

slaughter, even without fault, had need of expiation; how can any one fail to see, especially any Christian, what an unhappy and disastrous thing, and how strenuously to be avoided, is a war, even when not unjust? Certainly among the Greeks who professed Christianity, the Canon was long observed, by which those who had killed an enemy in any war whatever, were for a time excluded from participation in sacred offices.

CAPUT XXV.

DE CAUSIS BELLI PRO ALIIS SUSCIPIENDI.

I. *Bellum suscipi juste pro subditis:*
II. *Non semper tamen suscipiendum.*
III. *An subditus innocens hosti dedi possit, ut periculum vitetur.*
IV. *Bella item juste suscipi pro federatis æqualibus et inæqualibus.*
V. *Et pro amicis:*
VI. *Imo et pro hominibus quibusvis:*
VII. *Posse tamen id sine peccato omitti, si quis aut sibi metuat, aut etiam nocentis vitæ.*
VIII. *An pro subditis alienis defendendis justum sit bellum, distinctione explicatur.*
IX. *Injustas esse societates et mercenariam militiam sine causarum discrimine.*
X. *Etiam præcipue prædæ aut stipendii causa militare vitiosum esse.*

Lib. i. 5. I. 1 SUPRA cum de his, qui bellum gerunt, egimus, dictum ostensumque a nobis est, naturaliter non tantum unumquemque sui juris esse executorem, sed et alieni: quare quæ causæ justæ sunt ipsi, cujus res agitur, eædem justæ sunt iis, qui aliis opem ferunt[1].

Navar. xxiv. 18. 2 Prima autem maximeque necessaria cura [a]pro subditis,

[1] Confer PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. cap. vi. § 14. *J. B.*

[a] *Pro subditis*] Procopius *Persicorum* II. οὐ γὰρ ὁ μηδὲν αὐτὸς ἀδικῶν δίκαιος, εἰ μὴ καὶ τοὺς ὑφ' ἑτέρων ἀδι-

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CHAPTER XXV. *Of the causes of undertaking War on the account of others.*

I. 1 When we above spoke of those who make war, it was said and proved by us that, by Natural Law, not only each person has an executive power to assert his own right, but also the rights of others. Whence it follows, that the causes which justify him whose interest is concerned, do also justify those who help him.

2 The first and closest of such relations is, the care which we are bound to exercise for those who are under us, whether as members of a family or of our civil community; for these are, in a way, a part of him who is at the head of the body, as we there said. Thus the Gibeonites having put themselves under the Jewish people, that people took up arms for them, with Joshua for their leader. *Our ancestors,* says Cicero, *often undertook war, because merchants and sailors belonging to them were treated with injury.* And elsewhere, *How many wars did our ancestors undertake because Roman citizens*

sive qui familiari, sive qui civili subsunt imperio; sunt enim quasi pars rectoris, ut ibidem diximus. Sic pro Gabaonitis, qui se populo Hebræo subjecerant, arma sumsit is populus, duce Josua. *Majores nostri*, inquit Cicero ad Quirites, *sæpe, mercatoribus ac naviculariis injuriosius tractatis, bella gesserunt.* Alibi: *quot bella majores nostri susceperunt, quod cives Romani injuria affecti, navicularii retenti, mercatores spoliati esse dicerentur?* Iidem Romani pro quibus sociis arma sumere noluerant, pro iis deditis, id est factis subditis, eadem sumere necessarium duxerunt. Campani ad Romanos: *quandoquidem nostra tueri adversus vim atque injuriam justa vi non vultis, vestra certe defendetis.* Florus a Campanis fedus, quod ante habebant, sanctius ait factum omnium suorum deditione. *Fides agi visa*, inquit Livius, *deditos non prodi.*

Jos. x. 6. *Orat. pro Leg. Man.* c. 5. *Verr.* v. 58. Apud Liv. vii. 31. Lib. i. 16. n. 2. Lib. vii. 31.

II. Non tamen semper, quamvis justa causa subditi alicujus obligat rectores ad bella sumenda: sed ita demum, si id sine omnium aut plurium subditorum incommodo fieri potest. Rectoris enim officium magis circa totum quam circa partes versatur: et quo pars est major, eo ad totius naturam propius accedit.

III. 1 Itaque, si civis unus, quamvis innocens, ad exitium

κουμένους ἔχων ἐν ἐξουσίᾳ ῥύεσθαι πέφυκεν· neque enim statim justus est, qui injuriam nulli facit, nisi et eo sit animo, ut tutetur sibi commissos adversus alienas injurias. (Cap. 15.)

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were injured, their navigators detained, their merchants despoiled! The same Romans, though they would not take up arms for their allies, yet when the same peoples had become their subjects, thought it necessary to do so. The Campanians say to the Romans, *Since you will not allow us to defend our property against force and injury by our own just force, you will certainly defend it by yours.* Florus, as ambassador of the Campanians, says that the league which existed before had become more sacred by the surrender of all his countrymen. *It was considered a point of good faith*, says Livy, *not to desert those who had surrendered to us.*

II. But yet it is not always, even if the cause of a subject be just, that it obliges the rulers to enter upon a war; but then only, if it can be done without the damage of all, or the greater part, of the subjects. For the office of the ruler is concerned more with the whole than with the parts; and in proportion as the part is greater, it approaches nearer to the nature of the whole.

III. 1 Therefore if one citizen, though innocent, be demanded by

Soto, *de Just. et Jur. l.* v. q. 1. art. 7.

Lib. i. *contr. ill.* c. 13.

App. Alex. *Bell. Civ.* ii. p. 478.

ab hoste deposcatur, [b]dubium non est, quin deseri possit, si appareat, civitatem hostium viribus multo esse imparem. [2]Disputat contra hanc sententiam Ferdinandus Vasquius: sed, si non tam verba ejus, quam propositum spectetur, hoc videtur agere, ne civis talis temere deseratur, ubi cum defendi posse spes sit. Nam et historiam adfert Italici peditatus, qui Pompeium rebus nondum plane desperatis deseruit, de sua salute certior factus a Cæsare; quod ille non immerito improbat.

2 An vero etiam tradi in manus hostium possit civis innocens, ut vitetur imminens alioqui civitatis excidium, disputant eruditi, et olim disputatum est, ut cum Demosthenes nobilem illam de canibus, quos lupi pacis causa ab ovibus tradi sibi postulabant, fabulam protulit. Negant id licere non Vasquius tantum, sed is, cujus sententia ut perfidiæ propinqua a Vasquio arguitur, Sotus. Ponit tamen Sotus, teneri talem civem se hostibus tradere: hoc quoque negat Vasquius, quia natura societatis civilis, quam sui quisque commodi causa iniit, id non postulet.

[b] *Dubium non est, quin deseri possit*] Vide consilium Nicephori Patriarchæ datum Michaeli Rangabæ de transfugis pacis causa reddendis Bulgarorum duci, ubi hæc verba apud Zonaram: *κρεῖσσον εἶναι παθεῖν κρίνοντες μετρίους τινὰς, ἢ πλήθη πάσχειν ἀνήριθμα· satius judicemus esse, paucos aliquos mala ferre quam immensam multitudinem.* (Lib. XV. cap. xvii. pag. 127.)

[2] Vide PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. cap. ii. § 5. *J. B.*

[3] At vero hoc casu incertum satis

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the many, in order to be put to death, it is not doubtful that he may be given up*, if it appear that the state of which the demand is made is much too weak to contend. Vasquius disputes against this opinion; but if we look, not so much at his words, as at his purport, he seems to come to this, that such a citizen is not lightly to be deserted, when there is a hope that he may be defended. For he adduces the history of the Italic infantry, which deserted Pompey when his cause was not yet desperate, being assured of their safety by Cæsar; which he blames, and deservedly.

2 Whether an innocent citizen may be delivered into the hands

* This is an example of the evil of laying down rules for cases of necessity. If a city under the terror of destruction from a cruel enemy, should give up an innocent person to death, we might excuse them when the thing was done; but we can hardly look upon it as a speculative opinion which they may morally hold beforehand, that men are right in doing so. The certainty of saving themselves by such means must be doubtful, as Barbeyrac says: and no protest could be strong enough to express the horror which the Rulers of a State ought to feel towards such a step. W. W.

3 Sed hinc nihil aliud sequitur, quam ex jure proprie dicto civem ad hoc non teneri: at non etiam caritatem pati, ut aliter faciat. Multa enim sunt non justitiæ propriæ dictæ sed dilectionis officia, quæ non tantum cum laude præstantur, quod Vasquius agnoscit, sed etiam omitti sine culpa nequeunt. Tale autem omnino hoc videtur esse, [3]ut maximæ multitudinis innocentis vitam suæ unius quis præferat. Praxithea in Euripidis *Erechtheo* (vers. 32, et seqq.):

> *Εἴπερ γὰρ ἀριθμὸν οἶδα καὶ τοὐλάσσονος*
> *Τὸ μεῖζον, εἷς μὲν οἶκος οὐ πλέον σθένει,*
> *Πταίσας ἁπάσης πόλεος, οὐδ' ἴσον φέρει.*

> Si namque numeros, quidque sit plus aut minus,
> Percipimus animo, [c]non malo unius domus
> Commune vinci, sed nec æquari potest.

Atque ita Phocion Demosthenem atque alios hortabatur ad exemplum Leï filiarum et [d]Hyacinthidum potius mortem ipsi subirent, quam malum irreparabile patriæ inferri sinerent. Cicero pro P. Sextio: *si mihi in aliqua nave cum meis amicis naviganti hoc accidisset, ut multi ex multis locis prædo-* Diod. xvii. 15. Cap. 20.

est, an unius illius periculo salva futura sit multitudo. Plura diximus in Notis nostris Gallicis. *J. B.*

c Non malo unius domus
Commune vinci, sed nec æquari potest] Οὐ δίκαιον προσθήκην τὸ ὅλον μέρους εἶναι· *iniquum est, totum fieri accessionem partis.* Locus est apud Philonem fine libri I. *de Vita Mosis*, ubi et alia lectu dignissima. (Pag. 652.)

d *Hyacinthidum*] Vide Apollodorum in bibliotheca. (Lib. III. cap. xiv. n. 8.)

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of the enemy to avoid the otherwise imminent destruction of the city, the learned dispute, and the dispute existed also in ancient times; as when Demosthenes narrated the clever fable of the wolves requiring the sheep to give up their dogs for the sake of peace. That it is not lawful to do so, is maintained not by Vasquius only, but Sotus also, whose opinion Vasquius condemns as approaching to perfidy. Yet Sotus holds that such a citizen is bound to surrender himself to the enemy: this Vasquius denies, because the nature of civil society which every one enters into for his own advantage, does not require such a step.

3 But from this, nothing follows but that a citizen is not bound to this step, by any law properly so called; but it does not follow that charity allows him to do otherwise. For there are many duties, not of justice properly so called, but of good will, which it is not only laudable to perform, but which it is blameable to omit. And of such nature appears this to be, that each person should prefer the life of an innocent multitude to his own. So Euripides. And so Phocion exhorted Demosthenes and others that they should rather

nes classibus eam navem se oppressuros minarentur, nisi me unum sibi dedidissent: si id vectores negarent, ac mecum simul interire, quam me hostibus tradere mallent: jecissem me potius ipse in profundum; ut ceteros conservarem, quam illos mei tam cupidos non modo ad certam mortem, sed in magnum vitæ discrimen adducerem. Idem *de Finibus*
Cap. 19. III: *Vir bonus et sapiens, et legibus parens, et civilis officii non ignarus, utilitati omnium plus quam unius ali-*
Lib. xlv. 26. *cujus aut suæ consulit.* Apud Livium de Molossis quibusdam dictum legimus: *equidem pro patria, qui lethum oppetissent, sæpe fando audivi: qui patriam pro se perire æquum censerent, hi primi inventi sunt.*

4 Sed, hoc posito, restat dubitatio, an, quod ille facere tenetur, ad hoc cogi quoque possit. Negat hoc Sotus exemplo divitis qui egeno stipem dare ex misericordiæ præscripto tenetur, cogi tamen nequit. Sed notandum est, aliam esse rationem partium inter se, aliam superiorum, ubi cum sibi sub-

e *Etiam ad alia, quæ virtus qualibet præcipit*] Sic apud Lucanos pœna erat dicta prodigis, ingratis apud Macedonas, otiosis apud eosdem Lucanos et Athenienses: adde quæ allata ad libri I. cap. i. § 9.

f *Ad bella, quibus justa causa non subsit*] Vide Simlerum *de Republica*

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submit to death, after the example of the daughters of Leos and the Hyacinthids, than bring an irreparable calamity on their country. Cicero, pleading for Sextius, says, that if he were in a ship attacked by pirates who demanded him in particular, and would destroy the ship if he were not given up, he would rather throw himself into the sea than bring upon all the rest, not only certain death, but even extreme danger of death. And again, he says that a wise and good man will rather consult the safety of all than of any one in particular, even of himself. In Livy we read: I have often heard of men who would die for their country, but I never heard of any who thought it reasonable that their country should perish for them.

4 But, this being assumed, there remains this doubt, whether, what they are thus bound to do, they can be compelled to do. Sotus denies this, adducing the example of a rich man who is bound to give alms to a needy man by the rule of mercy, but cannot be compelled to do so. But it is to be remarked that the relation of such parties is different from that of superiors compared with subjects. For an equal cannot compel an equal, except to that which he has a right to, speaking strictly. But a superior can compel him to other things also which any virtue prescribes; because in the peculiar right of a superior as superior, this is comprehended. Thus in a great scarcity of

ditis comparantur. Nam par parem cogere non potest, nisi ad id quod ex jure debetur stricte dicto. At superior cogere potest [e]etiam ad alia, quæ virtus quælibet præcipit, quia in jure proprio superioris, qua superior est, hoc est comprehensum. Sic in magna frumenti penuria cives cogi possunt, quod habent, in medium conferre: quare et in nostra illa controversia verius videtur, cogi posse civem, ut id faciat, quod exigit caritas. Atque ita is quem dixi Phocion amicissimum quendam sibi Nicoclem nomine demonstrans aiebat, huc malorum ventum, ut si Alexander eum deposceret, ipse dedendum censeret.

Less. ii. 9. dub. 7.

Plutarch. *in Phocion.* p. 749 c.

IV. Subditis proximi, imo pares sunt in hoc, ut defendi debeant socii, in quorum fœdere comprehensum id est, sive in tutelam sese et fidem aliorum dederunt, sive mutua auxilia pacti sunt. *Qui non repellit injuriam a socio, si potest, tam est in vitio, quam ille qui facit*, ait Ambrosius. Pactiones autem tales [f]ad bella, quibus justa causa non subsit, porrigi

De Offic. i. 36.

Helvetiorum [pag. 160. *Edit. Elzevir.*] *Domino guerram faciente alicui, si sciatur, quod juste, aut cum dubitabitur, vasallus eum adjuvare tenetur. Sed cum palam est, quod irrationabiliter eam facit, adjuvet eum ad ejus defensionem, ad offendendum vero alium non adjuvet.* Lib. II. *de Feudis* Tit. 28. *Hic finitur.* [Vide supra c. 15, § 13, *M. T.*]

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corn, the citizens may be compelled to contribute to the common stock what each one has; and thus, in this question before us, it seems to be sound doctrine that the citizen may be compelled to do that which charity requires*. And thus Phocion, whom I have already mentioned, pointed out a very intimate friend of his, Nicocles by name, and said that matters were come to such a miserable condition that if Alexander demanded *him*, he would be of opinion that he ought to be given up.

IV. As parties whom we are bound to defend, next to our subjects, come our allies. This is comprehended in our engagement with them, whether they have put themselves under the authority and protection of others, or have contracted for mutual aid. *He who does not repel an injury for an ally, if he can, is in the wrong as much as he who does the injury*, says Ambrose. That such contracts are not to be extended to wars, where there is no just cause for the war, we have elsewhere said. And this is the reason why the Lacedæmo-

* It is quite extravagant to place the sacrifice of one's own life on a level with other offices of charity. As Grotius himself has just said, (chap. XXIV. 6,) life is the foundation of all enjoyment in this world, and the occasion of all the happiness of another: and it must be only under peculiar circumstances that a man can dispose of these possessions, as if they resembled other possessions. W.

haud posse diximus alibi. Et hæc est causa, cur Lacedæmonii, priusquam bellum in Athenienses susciperent, sociis omnibus de causæ justitia judicium permiserint: et Romani Græcis de bello in Nabidem. Nunc illud addamus, ne tunc quidem teneri socium, si nulla spes sit boni exitus. Boni enim, non mali causa societas contrahitur. Defendendus autem socius est etiam contra alium itidem federatum, nisi priori federe aliquid specialius convenerit. Sic Corcyræos, si causa eorum justa erat, Athenienses defendere potuerunt etiam contra Corinthios socios vetustiores.

Thucyd. i. 119, 125. Liv. xxxiv. 22. *Vide supra*, c. 16. § 13. n. 2.

V. [g] Tertia causa est amicorum, quibus auxilium promissum quidem non est, sed tamen amicitiæ quadam ratione debetur, si facile et sine incommodo exhiberi possit. Sic pro Lotho cognato arma sumsit Abrahamus: Antiatibus [4] præceperunt Romani, ne in Græcos, utpote Italorum cognatos, piraticam exercerent. Iidem sæpe non pro sociis tantum, quibus ex federe id debebatur, sed pro amicis bella susceperunt, aut suscipere minati sunt.

Vict. *de Ind.* p. 2. n. 17. Cajet. 2, 2. q. 4. art. 1.

VI. Postrema latissimeque patens est, hominum inter se

g *Tertia causa est amicorum*] Oraculum vetus, [apud ÆLIANUM, *Var. Hist.* III. 44.]

Ἀνδρὶ φίλῳ θνήσκοντι παρὼν πέλας οὐκ ἐβοήθεις·
Οὔ σε θεμιστεύσω. περικαλλέος ἔξιθι ναοῦ.

Non ope juvisti præsens in morte sodalem:
Effabor tibi nil, nisi, Templi finibus exi.

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nians, before they began their war with the Athenians, put the matter to the judgment of all their allies; as also the Romans did with regard to the Greeks, respecting the war with Nabis. We will further add, that even in such a case, the ally is not bound, if there be no hope of a good result. For such alliances are contracted, not for the sake of evil results, but of good. An ally however is to be defended even against another confederate, except there be some special stipulation to the contrary in some previous convention. Thus the Corcyreans, if their cause was good, might have received defensive aid from the Athenians, even against the Corinthians, who were their old allies.

V. The third cause [in which we may undertake war on account of others, subjects and allies being the first two cases,] is the cause of friends, to whom we have not promised aid, but to whom it is in a manner due on the ground of friendship, if it can be given easily and without inconvenience. Thus Abraham took arms for Lot, his relative; the Romans commanded the Antiates not to exercise piracy against the Greeks, as being related to the Italians. The Romans too, often

conjunctio, quæ vel sola ad opem ferendam sufficit. *Homo in adjutorium mutuum generatus est*, ait Seneca. Ejusdem est: *Sapiens, quoties poterit, fortunæ intercedet.* Euripides in *Supplicibus* (vers. 267, et seqq.): Cic. *de Fin.* iii. *de Offic.* ii. L. *ut vim*, 3. *D. de Just. et Jur.* *De Ira*, i. 5. *De Clem.* ii. 16.

> Præbent saxa perfugium feris,
> Aræque famulis, urbibus pressis malo
> Tutamen urbes.

Ambrosio *fortitudo, quæ defendit infirmos, plena justitia est:* qua de re supra quoque egimus. *De Offic.* i. 27. Lib. i. 5.

VII. 1 Quæritur hic, an teneatur etiam homo hominem, populus populum ab injuria defendere. [h]Plato puniendum censet, qui vim alteri illatam non arcet: quod et Ægyptiorum legibus cavebatur. Sed primum, si manifestum sit periculum, non teneri certum est: potest enim suam vitam et res alienis præferre. Atque ita interpretandum censeo illud Tullii, *qui non defendit, nec obsistit, si potest, injuriæ, tam est in vitio, quam si parentes, aut patriam, aut socios deserat:* ut *potest* illud intelligamus, cum suo commodo: nam et idem alibi dicit, *non defendi homines sine vituperatione fortasse possunt.* *De Leg.* ix. p. 831. Diod. i. 77. *De Offic.* i. 7. Apud Amm. Marc. xxx. 4. p. 643.

[4] Habet hoc Auctor e STRABONE, *Geogr.* Lib. v. sed rem non satis adcurate narrat. Inspice, si lubet, locum, pag. 354, 355. *Edit. Paris. Casaubon. J. B.*

[h] *Plato puniendum censet, qui vim alteri illatam non arcet*] Et Hebræi, Moses de Kotzi præcepto jubente LXXVII. LXXX. vetante CLXIV. CLXV.

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took up arms for their allies, not only when they were bound to do so by treaty, but also for their friends; or threatened to take up arms in such cases.

VI. The last and widest reason for taking up arms, is the connexion of men with men as such, which alone is often sufficient to induce them to give their aid. *Men are made for mutual help*, says Seneca, and the like; so Euripides and Ambrose.

VII. 1 Here the question is raised, whether man be bound to defend man, and people to defend people, from wrong. Plato thinks that *he* ought to be punished who does not repel force offered to another; and this was also provided by the laws of the Egyptians. But, in the first place, if the danger be manifest, it is certain that he is not so bound; for he may reasonably prefer his own life and possessions to those of others. And in this sense, as I conceive, we are to interpret what Cicero says, that *he who does not repel and resist an injury when he can, is as much in fault as if he were to desert his parents, or his country, or his allies: when he can,* we are to understand, with convenience to himself: for the same writer elsewhere says, *Per-*

Fragm. iv. 2. Apud Sallustium est in historiis: *omnes, qui secundis rebus suis ad belli societatem orantur, considerare debent, liceatne tum pacem agere; dein, quod quæritur, satisne pium, tutum, gloriosum, an indecorum sit.*

2 [i]Senecæ quoque hoc non spernendum: *succurram perituro, sed ut ipse non peream, nisi si futurus ero magni* Less. ii. 4. dub. 15. *hominis aut magnæ rei merces.* Sed ne tunc quidem tenebitur, si oppressus nisi morte invasoris eripi non potest. Nam [[ii. 1, 9.]] si invasoris vitam, qui invaditur, suæ potest præferre, ut alibi diximus, non peccabit, qui invasum id aut credet, aut volet malle: præsertim cum ex parte invasoris majus sit periculum damni irreparabilis et sempiterni.

VIII. 1 Est et illud controversum, an justa sit belli causa pro subditis alienis, ut ab eis arceatur imperantis injuria. Sane ex quo civiles societates institutæ sunt, certum est, rectoribus cujusque speciale quoddam in suos jus quæsitum. Euripides *Heraclidis* (vers. 143, 144):

Δίκαιοι δ' ἐσμὲν οἰκοῦντες πόλιν
Αὐτοὶ καθ' αὑτοὺς κυρίους κραίνειν δίκας.

Nos, quotquot hujus colimus urbis mœnia,
Sufficimus ipsi nostra judicia exsequi.

[i] *Senecæ quoque*] Locus est *de Beneficiis* II. 15. alter non dissimilis ejusdem argumenti Lib. I. cap. 10. *Dignum etiam impendio sanguinis mei tuebor, et in partem discriminis veniam: indignum, si eripere latronibus potero clamore sublato, salutarem vocem homini non pigebit emittere.* Vide quæ supra libro II. cap. i. § 8.

[k] Rescindere nunquam
Dis licet acta Deum.]

Ejusdem est III. *Metamorph.* (vers. 336):

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haps we cannot defend men without incurring blame. So Sallust says that *when we are asked to assist allies, it is to be considered whether we may abstain from war; and then, whether what is required is sufficiently pious, safe, glorious; or on the other hand, unbecoming.*

2 And the warning of Seneca is not to be despised: *I am willing to help a man who is perishing, but so that I myself do not perish; except I am to be the ransom of a great man or a great cause.* And even then, he will not be bound, if the person oppressed cannot be extricated without the death of the assailant. For if he may in some cases prefer the life of the assailant to his own, when he is attacked, as we have elsewhere said, he will not be wrong who either thinks or desires that another person so attacked has the same preference: especially when there is a greater danger of irreparable and eternal loss on the part of the invader.

VIII. 1 There is also another question, Whether a war for the

Nec alio illud pertinet: *Frag. Phœnicis* Euripid. vs. 19, 20.

Spartam, tibi quæ contigit, orna:
Nobis fuerint cura Mycenæ.

Et Thucydides inter summi imperii signa posuit τὸ αὐτόδικον, Lib. v. 18. *judiciorum summam potestatem*, non minus quam τὸ αὐτόνομον καὶ τὸ αὐτοτελὲς, id est, *legum et magistratuum creandorum jus.* Nec alio pertinet poëticum illud: Virg. *Æn.* i. v. 142.

Non illi imperium pelagi regnumque tridentis,
Sed mihi sorte datum.

Et huic non dissimile illud: Ovid. *Met.* xiv. v. 784.

[k]Rescindere numquam
Dis licet acta Deum.

Et apud Euripidem: *Hippolyt.* v. 1328.

Mos ille est Deum;
Quod cupit unus, huic nefas obsistere:

Nimirum, ut recte explicat Ambrosius: *ne, usurpata aliarum partium sollicitudine, bellum inter se incitarent:* Lib. i. *de Offic.* c. 13. τοὺς σφετέρους αὐτόν τινα κολάζειν, [l]*ut in suos quisque animadvertant*, æquum esse censent Corinthii apud Thucydidem. Lib. i. 43. Et Perseus in oratione ad Martium, quod in Dolopes fecisset, negat se defensurum: *jure*, inquiens, *feci meo, cum mei regni,* Liv. xlii. 41.

Neque enim licet irrita cuiquam
Facta Dei fecisse Deo.

[l] *Ut in suos quisque animadvertant*] Augustinus II. *de Libero Arbitrio: non enim, ut alicujus est bonitatis, alienis præstare beneficia, ita justitiæ, vindicare in alienos.* (Cap. 1.) Procopius *Vandalicorum* I. τὴν ὑπάρχουσαν ἡγεμονίαν αὐτόν τινα διοικεῖσθαι καλὸν, καὶ μὴ ἀλλοτρίας οἰκειοῦσθαι φροντίδας· *quod cuique obtigit imperium, id ut administret, ac ne alienas curas in se trahat, honesto convenit.* (Cap. 9.)

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subjects of another be just, for the purpose of defending them from injuries inflicted by their ruler. Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some especial right over his own subjects. Euripides makes his characters say that they are sufficient to right wrongs in their own city. And Thucydides puts among the marks of empire, the supreme authority in judicial proceedings. And so Virgil, Ovid, and Euripides in the *Hippolytus.* This is, as Ambrose says, that *peoples may not run into wars by usurping the care for those who do not belong to them.* The Corinthians in Thucydides say that it is right that each state should punish its own subjects. And Perseus says that he will not plead in defense of what he did against the Dolopians, since they were under his authority and he had acted upon his right. But all this applies when the subjects have really violated their duty; and we may add, when

meæ ditionis essent. Sed hæc omnia locum habent, ubi vere delinquunt subditi, adde etiam, ubi dubia est causa. In hoc enim instituta est illa imperiorum distributio.

Vict. *Rel. de Ind.* n. 15.

2 At non etiam, si manifesta sit injuria, si quis Busiris, Phalaris, Thrax Diomedes ea in subditos exerceat, quæ æquo nulli probentur, ideo præclusum erit jus humanæ societatis. Sic in Maxentium et in Licinium Constantinus, [m]in Persas alii Romanorum Imperatores arma ceperunt, aut capere minati sunt, nisi vim a Christianis religionis nomine arcerent.

Vict. *Rel. de Ind.* p. 2. n. 13.

3 Imo etiam si daretur, ne in summa quidem necessitate arma recte a subditis sumi (qua de re dubitare vidimus illos ipsos, quorum institutum fuit regiam potestatem defendere) non tamen inde sequetur, non posse pro ipsis ab aliis arma sumi. Quoties enim actioni alicui impedimentum ponitur personale, non ex re; toties quod uni non licet, alteri pro eodem licere potest, si modo tale sit negotium, in quo alter alteri prodesse possit. Sic pro pupillo, cujus persona judicium non capit, litigat tutor aut alius: pro absente etiam sine mandato

[m] *In Persas alii Romanorum Imperatores*] Exemplum simile habes in rebus Pipini apud Fredegarium in fine.

[5] Videtur heic, in omnibus Editionibus, excidisse vox *subditorum*, quam series orationis postulat. *J. B.*

[6] Adludit forte Auctor ad illud QUINTILIANI: *Non fabricetur Militi gladius: potest uti eodem ferre Latro. Inst. Orat.* Lib. II. cap. 16 [[§ 6]]. *J. B.*

[n] *Ut in quodvis bellum nullo causæ discrimine promittantur auxilia*] Iterum

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the case is doubtful. For that distribution of power was introduced for that case.

2 But the case is different if the wrong be manifest. If a tyrant like Busiris, Phalaris, Diomede of Thrace, practises atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case. So Constantine took arms against Maxentius and Licinius; and several of the Roman emperors took or threatened to take arms against the Persians, except they prevented the Christians being persecuted on account of their religion.

3 But if we should grant that subjects cannot rightly take up arms even in extreme necessity, (which, we have seen, has been doubted even by those whose purpose was to defend the royal power,) it would not follow that others may not take up arms for them. For when the impediment which exists to an action is in the person, not in the thing itself; in such cases, what is not lawful to one person may be lawful to another for him, if it be a case in which one can help another. Thus for a ward or minor, who is not capable of legal acts, the guardian or trustee sustains the suit; and for an absent person, an agent

defensor. Impedimentum autem quod resistere subditum prohibet, non ex causa venit quæ eadem est in subdito et in non subdito, sed ex personæ qualitate, quæ in alios non transit.

4 Sic Seneca existimat bello a me peti posse, qui a mea gente sepositus suam exagitat, ut diximus, cum de pœnis exposcendis ageretur: quæ res sæpe cum defensione [5]innocentium conjuncta est. Scimus quidem ex veteribus novisque historiis, alieni cupiditatem hos sibi quærere obtentus: sed non ideo statim jus esse desinit, siquid a malis usurpatur. Navigant et piratæ: [6]ferro utuntur et latrones. *De Benef.* vii. 19.

IX. 1 Sicut autem societates bellicas eo initas animo, [n]ut in quodvis bellum nullo causæ discrimine promittantur auxilia, illicitas diximus, ita nullum vitæ genus est improbius quam eorum qui sine causæ respectu mercede conducti militant, et quibus *Silv. in Verbo Bellum,* p. 1. § 10. *circa f.*

Ibi fas, ubi plurima merces.

Quod Plato [7]ex Tyrtæo probat. Hoc ipsum est quod Ætolis a Philippo exprobratum legimus: et Arcadibus a [8]Dionysio Liv. xxxii. 34.

Simlerum hac de re vide.

[7] Locus, quem in animo habuit Auctor, exstat *de Legib.* Lib. I. pag. 630 B. Tom. II. *Ed. H. Steph.* ubi equidem Philosophus adludit ad versus duos Tyrtæi, sed in quibus Poeta nullo modo loquitur de iis qui mercede conducti militant. Plato tantum de illis loquitur, sed ita ut ejusmodi vitæ genus, in se spectatum, nec vituperet, nec laudet. *J. B.*

[8] Locum forte reperi apud PHILO-

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even without a special commission. Now the impediment which forbids the subject to resist, does not arise from the cause, which is the same in the subject and the non-subject; but from the quality of the person, which does not pass over to others.

4 Thus Seneca thinks that I may attack in war him who, though he is a stranger to my nation, persecutes his own; as we said when we spoke of exacting punishment: and this is often joined with the defense of innocent subjects. We know indeed, both from ancient and from modern histories, that the desire to appropriate another's possessions often uses such a pretext as this but that which is used by bad men does not necessarily therefore cease to be right. Pirates use navigation, but navigation is not therefore unlawful. Robbers use weapons, but weapons are not therefore unlawful*.

IX. 1 But, as we have said, that leagues made with a view to mutual help in all wars alike, without distinction of the cause, are unlawful; so no kind of life is more disreputable than that of those who act as soldiers for pay merely, without regard to the cause; whose

* See Barbeyrac's happy verification of these and the following quotations.

Milesio his verbis: ἀγορὰ πολέμου πρόκειται, καὶ τὰ τῶν Ἑλλήνων κακὰ τὴν Ἀρκάδων τρέφει, καὶ περιέρχεται πόλεμος αἰτίαν οὐκ ἔχων· *belli instituuntur nundinæ, et Græcorum mala in fructu sunt Arcadibus, et sine causarum respectu modo huc modo illuc arma circumferuntur.* Res sane miseranda, ut Antiphanes loquitur:

[[Apud Stob. tit. 53.]]

Ὃς ἕνεκα τοῦ ζῆν ἔρχετ' ἀποθανούμενος,

Miles [o] qui vitæ causa se auctorat neci.

Orat. xvii. p. 249 D.

Dion Prusæensis: καί τοι τί τοῦ ζῆν ἀναγκαιότερόν ἐστιν, ἢ τί τούτου περὶ πλείστου ποιοῦνται πάντες; ἀλλ' ὅμως καὶ τοῦτο ἀπολύουσι διὰ χρημάτων ἐπιθυμίαν· *quid magis est necessarium nobis, aut quid pluris fit quam vita? et tamen hanc quoque non pauci perdunt, dum pecuniam quærunt.*

Bellin *de Re milit.* ii. p. tit. 2. n. 4.

2 Parum vero quod suam vendunt necem, nisi et aliorum sæpe innocentium venderent, tanto carnifice detestabiliores, [p] quanto pejus est sine causa, quam ex causa occidere: sicut Antisthenes dicebat carnifices tyrannis esse sanctiores, quod illi nocentes, hi innocentes interficerent. Major Philippus Macedo huic hominum generi, τὰς τροφὰς εἰωθόσιν ἔχειν ἐκ

Apud Stob. *Serm.* 49. p. 350.

Diod. Sic. xviii. 10.

STRATUM, *Vit. Sophist.* Lib. I. cap. 22. sed qui non satis adcurate refertur et vertitur. Diximus plura in Notis Gallicis. *J. B.*

[o] *Qui vitæ causa se auctorat neci*] Vita parari ea in quibus vita consumitur, dixit Seneca *Naturalium* V. 18. Plautus *Bacchidibus,* [ibi nil tale, nec alibi, quod sciam, apud Plaut. *J. B.*]

Suam qui auro vitam venditant.

Guntherus (*Ligurin.* L. VII. 510, &c.)

Ære dato conducta cohors, et bellica miles
Dona sequens, pretioque suum mutare favorem

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motto is, *the right is where the best pay is:* as Plato proves from Tyrtæus. This is the reproach which Philip cast upon the Etolians, and Dionysius of Miletus upon the Arcadians; saying, that *there was a market where the Arcadians made a profit of the misfortunes of the Greeks.* As Antiphanes says, It is a wretched life to be ready to die in order to live. So Dio Prusæensis.

2 But that they sell their own lives is little, if it were not that they sell too the lives of other innocent men: and in this way they are worse than the hangman, in proportion as it is worse to kill men without a cause than for a cause: as Antisthenes says that executioners are more respectable than tyrants, for they kill guilty, these, innocent men. Philip of Macedon (the greater) said that for those whose gain was in a soldier's life, peace was war, and war, peace.

3 War is not one of the acts of life. On the contrary, it is a thing so horrible, that nothing but the highest necessity or the deepest charity can make it be right: as may be understood from what we

τοῦ μισθοφορεῖν, quibus unus ex militia quæstus esset, dicebat bellum esse pacem, pacem bellum.

3 Non est inter artificia bellum, imo res est tam horrenda, ut eam nisi summa necessitas, aut vera caritas honestam efficere nequeat: quemadmodum ex iis intelligi potest quæ capitum antecedentium proximo dicta a nobis sunt. Augustino judice: *militare non est delictum, sed propter prædam militare peccatum est.* *De verbis Domini, secundum Matthæum. citatur causa* xxiii. *quæst.* 1. c. 5. *Vide supr.* i. 2. 10. n. 5.

X. Imo et propter stipendium, si id unice aut præcipue spectetur: cum alioqui stipendium accipere licitum sit omnino: *τίς στρατεύεται ἰδίοις ὀψωνίοις ποτέ*; ait Paulus apostolus: *quis suis impensis militat?* 1 *Cor.* x. 7.

Suetus, et accepto pariter cum munere bello
Hunc habuisse, dator pretii quem jusserit, hostem.

p *Quanto pejus est sine causa, quam ex causa occidere*] Seneca *Naturalium* v. 18. *Hoc vero quid aliud quis dixerit, quam insaniam? circumferre pericula, et ruere in ignotos, iratum sine injuria, occurrentia devastantem, ac ferarum more occidere quem non oderis?*

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have said in the last chapter but one. Augustine says, *to be a soldier is not a sin, but to be a soldier for plunder, is.*

X. And not for plunder only, but for pay, if that be regarded solely or principally; though in the other case, it is allowable to receive pay. St Paul says, *Who goeth to warfare at his own charge?*

CAPUT XXVI.

DE CAUSIS JUSTIS UT BELLUM GERATUR AB IIS QUI SUB ALIENO IMPERIO SUNT.

I. *Qui dicantur esse sub alieno imperio.*
II. *Quid hic faciendum si ad deliberationem adhibeantur, aut liberam electionem habeant.*
III. *Si imperetur ipsis, et causam belli injustam credant, non militandum.*
IV. *Quid si dubitent?*
V. *Pietatis esse hac in re dubitantibus subditis parcere, sub onere tributi extraordinarii.*
VI. *Quando subditorum arma justa sint in bello injusto.*

I. EGIMUS de his qui sunt sui juris: sunt alii in conditione parendi positi, ut filii familiarum, servi, subditi, etiam cives singuli, si cum civitatis suæ corpore comparentur.

Ægid. Reg. de act. sup. disp. 31. n. 80.

II. Hi vero si aut ad deliberationem adhibentur, aut libera ipsis optio datur militandi aut quiescendi, easdem regulas sequi debent, quas illi, qui suopte arbitrio pro se aut aliis bella suscipiunt.

III. 1 At si edicitur ipsis ut militent, quod fieri solet,

a *Sed et Socrates*] Plato id nos docet in ipsius *Apologia:* (Pag. 29 c. *Ed. H. Steph.*) [Adde Lib. I. c. 4, §1, n. 3. *M. T.*] Et Apollonius, qui Neronis Edicto illud Sophocleum opponebat:

Οὐ γάρ τί μοι Ζεὺς ἦν ὁ κηρύξας τόδε.
Nam jussa non hæc Jupiter dederat mihi.

[Apud Philostratum, Lib. IV. c. 38. *Ed. Olear.*]

b *Hebræorum exstat sententia*] Quam et Josephus eis tribuit *Antiquæ Historiæ* XVII. (cap. vii. § 3. *division. Hudson.*) *θαυμαστὸν δὲ οὐδὲν εἰ τῶν σῶν δογμάτων ἀξιωτέρους τετηρῆσθαι ἡγούμεθα νόμους οὓς Μωϋσῆς ὑπαγορεύσει καὶ διδαχῇ τοῦ Θεοῦ γραψάμενος κατέλιπε. nihil vero mirum, si servatu digniora credimus jussis tuis ea quæ Moses Deo suggerente ac docente scripta reliquit.* Adde Rabbinum Tanchumam, citante Drusio ad locum Actorum.

c *In Domino*] Chrysostomus hoc *in Domino* sic explicat: *τουτέστιν ἐν οἷς μὴ προσκρούσῃς Θεῷ· id est in quibus Deum offensurus non es.* Idem ad patrem infidelem: (Tom. VI. pag. 181. *Ed. Savil.*) *οὐ γὰρ δὴ μικρὸς ἡμῖν κεῖται μισθὸς τοῖς τοὺς γεγεννηκότας τιμῶσιν, ἀλλ' ὡς δεσπότας αὐτοὺς ἡγεῖσθαι κελευόμεθα, λόγῳ τε καὶ ἔργῳ θεραπεύειν, ὅταν μὴ δὴ τὰ τῆς εὐσεβείας παραβλάπτηται· non enim*

CHAPTER XXVI. *Of the just causes for which War may be made by those who are under the authority of another.*

I. We have treated of those who are their own masters. There are others who by their condition are under authority, as sons of families, servants, subjects, even individual citizens, as compared with the whole body of their city.

si quidem constat ipsis injustam esse belli causam, abstinere omnino debent. Deo potius obediendum quam hominibus, non Apostoli tantum dixerunt, [a]sed et Socrates: et apud magistros [b]Hebræorum exstat sententia, indicans regi contra Dei legem quid præcipienti prorsus non parendum. Polycarpi jamjam morituri dictum exstat: δεδιδάγμεθα γὰρ ἀρχαῖς καὶ ἐξουσίαις ἀπὸ Θεοῦ τεταγμέναις τιμὴν κατὰ τὸ προσῆκον τὴν μὴ βλάπτουσαν ἡμᾶς ἀπονέμειν· *didicimus imperiis ac potestatibus a Deo ordinatis exhibere honorem quem par est, quique salutem nostram non impediat.* Et Paulus Apostolus: *filii,* inquit, *obedite parentibus* [c]*in Domino, id enim æquum est.* Ad quem locum Hieronymus: *peccatum filiorum est non obedire parentibus; et quia poterant parentes aliquid imperare perversum, adjunxit, in Domino.* Et [d]de servis addit: *cum Dominus carnis a Domino spiritus diversum imperat, non est obediendum.* Idem alibi: *in illis tantum debent dominis et parentibus esse subjecti, quæ contra Dei mandatum non sunt.* Nam et idem ille Apostolus dixerat, sui quemque operis mercedem reportaturum, sive liberum, sive servum. Tertullianus vero: *satis præscriptum habemus, in omni ob-*

Vict. *de Jure Belli*, n. 21.
Act. v. 29.
Apud Euseb. *H. Eccl.* iv. 15.
Eph. vi. 1.
Tom. ix. p. 237 c.
Eph. vi. 8.
De Idol. c. 15.

exigua nobis merces proposita est, si honorem exhibeamus parentibus, sed ut dominos eos habere jubemur, verbisque et rebus obsequium ipsis præstare, extra quam si pietas lædenda est. Sic accipe illud Hieronymi, *per calcatum perge patrem,* (Epist. I. ad Heliodorum, Tom. I. Pag. 1. *Ed. Basil.*) declamatorie dictum, sumtumque a latrone declamatore apud Senecam, (*Controvers.* VIII. p. 142. *Edit. Gronov. major.*) et quæ apud Ambrosium *de Virginitate,* et apud Augustinum Epist. XXXVIII. ad Lætum, et canone IV., Arabicæ interpretationis concilii Niceni I.

[d] *De servis*] Chrysostomus, I. Cor. vii. 24: καὶ γάρ εἰσιν ὅροι δούλῳ παρὰ τοῦ Θεοῦ κείμενοι· καὶ μέχρι ποῦ δεῖ φυλάττειν αὐτοὺς καὶ τοῦτο νενομοθέτηται, καὶ ὑπερβαίνειν αὐτοὺς οὐ χρή. ὅταν γὰρ μηδὲν ὁ δεσπότης ἐπιτάττῃ τῶν μὴ δοκούντων τῷ θεῷ, ἕπεσθαι δεῖ καὶ πείθεσθαι, περαιτέρω δὲ μηδέν· *Sunt et servis limites sui a Deo præscripti, et quousque eos servare oporteat et hoc præceptum est, neque eos licet excedere. Ubi enim nihil dominus jubet eorum quæ Deo improbantur, sequi et obsequi oportet, non ultra.* (Tom. III. pag. 362.) De matrefamilias Clemens Alexandrinus: πάντα τῷ ἀνδρὶ πειθομένη, ὡς μηδὲν ἄκοντος ἐκείνου πρᾶξαί

II. These, if they are either called to counsel, or if a free option is given them of war or peace, ought to follow the same rulers as they who by their own decision undertake wars for themselves or others.

III. 1 But if they are commanded to join in a war, as often happens, if they are quite clear that the war is unlawful, they ought to abstain. That God is to be obeyed rather than men, not only the Apostles have said, but Socrates also: and the masters among the

sequio esse nos oportere, secundum Apostoli præceptum, [e] *subditos magistratibus, principibus, et potestatibus: sed intra limites disciplinæ.* In martyrologio Silvanus martyr: *iccirco Romanas leges contemnimus ut jussa divina servemus.* Apud

Phœn. v. 1642. Euripidem dicenti Creonti:

Nonne exequi mandata fas ipsum jubet?

Respondet Antigone:

Non imperata jure nec jus exsequi.

Stob. tit. 77. *liber. parent. honorand.* Musonius ita ait: *si quis aut patri,* [f] *aut magistratui, aut domino turpia aut iniqua factu imperanti non paret, is nec inobediens est, nec injuriam facit, nec peccat.*

Lib. ii. 7. 2 Gellius negat probam esse sententiam, omnia esse quæ pater jusserit parendum. *Quid enim,* ait, *si proditionem patriæ, si matris necem, si alia quædam imperarit turpia aut impia? Media igitur sententia optima atque tutissima visa est, quædam esse parendum, quædam non obsequendum.*

Decl. 271. [g] Seneca pater: *non omnibus imperiis parendum est.* [h] Quintilianus: *non omnia necesse est facere liberis, quæcumque patres imperant. Multa sunt quæ fieri non possunt. Si imperes filio ut sententiam dicat contra quam existimet: si testimonium jubeas dici ejus rei quam ignoret: si sententiam*

ποτε, πλὴν ὅσα εἰς ἀρετήν τε καὶ σωτηρίαν διαφέρειν νομίζηται· *in omnibus viro parebit, neque eo invito faciet quicquam, extra quæ credet ad virtutem salutemque momentum habere.* (*Stromat.* Lib. IV. cap. 19. pag. 620. *Ed. Oxon.*)

[e] *Subditos magistratibus*] Exempla illustria et pœnæ et laudis vide I. Sam. xxii. 18, 19. I. Reg. xviii. 4, 13. II. Reg. i. 10, 12, 14. Apud Christianos Manuel et Georgius detrectarunt ministerium occidendæ Augustæ. Nicetas Alexio Manuelis filio. (Cap. 16.) [V. § 4, n. 9, adn. 5.]

[f] *Aut magistratui*] In paganis hominibus duo sunt nobilia exempla eorum qui principibus ad inhonesta obsecuti non sunt, Papiniani satis celebratum, et alterum Helpidii apud Ammianum XXI. (cap. 6.) Severus ne eos quidem pœnæ expertes voluit esse qui Imperatori obsecuti essent ad necem senatoris. Vide Xiphilinum, (pag. 310 A. *Ed. H. Steph.*)

[g] *Seneca pater*] Libro I. controversia I.

[h] *Quintilianus*] Idem alibi: *non*

Hebrews have a saying indicating that even the king, if he command anything against the law of God, is not to be obeyed. That our obedience is to be limited by our duty to God, is declared by Polycarp at the point of death; Jerome on St Paul, Eph. vi. 1; Tertullian; Sylvanus the martyr; Antigone in Euripides; Musonius.

2 That a father or master is not to be obeyed if he command a crime, as treason, the murder of his mother, false sentence, and the like, is asserted by Gellius, Quintilian, Seneca, Sopater. Stratocles was laughed at in Athens for proposing a law that whatever was

in senatu: si capitolium me incendere jubeas, arcem occupare, licet dicere: Hæc sunt quæ fieri non oportet. Seneca: *non aut nos omnia jubere possumus, aut in omnia servi parere coguntur. Contra rempublicam imperata non facient: nulli sceleri manus commodabunt.* Sopater: ἔδει, φησὶ, πεισθῆναι τῷ πατρί. εἰ μὲν κατὰ νόμους, καλῶς. εἰ δὲ παρὰ τὸ πρέπον, οὐκ εὔλογον· *patri,* inquit, *parendum est. Si quidem intra jura, recte: sin ultra honestum, non convenit.* [i] Irrisus olim Stratocles, qui legem Athenis rogaverat, ut quicquid Demetrio regi placuisset id in Deos pium et inter homines justum esset. Plinius alicubi elaboratum a se ait, ut constaret [k] ministerium crimen esse.

De Benef. iii. 20.

Plut. *in Demetr.* pp. 889, 900.

Lib. iii. *Epist.* 9.

3 Ipsa jura civilia, quæ peccatis excusabilibus facile veniam præbent, favent quidem his qui parere necesse habent, sed non in omnibus. Excipiunt enim ea quæ atrocitatem habent facinoris vel sceleris, quæ sua sponte scelerata ac nefaria sunt, ut loquitur Tullius, maleficia quæ sponte et non disputatione jurisconsultorum sed naturali interpretatione fugienda sunt, ut Asconius interpretatur.

L. Adeo, 157. *D. de R. J.*

In Verr. i. 42.

In hunc loc.

4 Narratum Hecatæo Josephus memorat, Judæos qui Alexandro Macedoni militabant, neque verberibus neque con-

Lib. i. *contr. Apion.* c. 22. p. 456.

omnia præstanda etiam parentibus. Alioquin nihil est perniciosius acceptis beneficiis: si in omnem nos obligant servitutem. (*Declamat.* 333.)

[i] *Irrisus olim Stratocles*] Talis erat syngrapha illa quam a Basilio Camatero Andronicus Comnenus exegerat: ἐκεῖνα ἐν τῷ ἀρχιερατεύειν διαπράττεσθαι ὅσα φιλητὰ Ἀνδρονίκῳ, κἂν εἴησαν παναθέμιτα, κἀκεῖνα πάλιν ἀποστυγεῖν, ὁπόσα οὐχ ἡδύνει Ἀνδρόνικον· *illa in pontificio se facturum quæ grata Andronico essent, quamvis plane nefaria: contra defugiturum se ea quæ Andronico non placerent.* [Nicetas, Alex. cap. 15.]

[k] *Ministerium crimen esse*] Tertullianus *de Anima: plus cæditur qui jubet, quando nec qui obsequitur excusatur.* (Cap. 40.) et *de Resurrectione Carnis: cum humana censura eo perfectior habeatur, quo etiam ministros facti cujusque deposcit, nec parcens aut invidens illis, quo minus cum auctoribus aut pœnæ aut gratiæ communicent fructum.* (Cap. 15.) Vide Gailium *de Pace Publica,* Lib. I. cap. IV. n. 14.

thought good by Demetrius, should be reckoned right and pious. Pliny somewhere says that he had laboured to prove that to be ministerial in a crime was a crime.

3 Even the Civil Law, which is facile in giving pardon to excusable offenses, is favourable to those who are under the necessity of obeying, but not to all. It excepts cases of great atrocity, crimes which are naturally abominable, not condemned by the opinion of lawyers only, but by natural feeling.

4 Josephus relates that the Jews, under Alexander the Great, would

tumeliis ullis adigi potuisse, ut ad Beli templum, quod Babylone erat, instaurandum, humum cum militibus ceteris aggererent. Sed propius nostri argumenti exemplum habemus in Thebæa legione, de qua supra egimus, et in Juliani militibus, de quibus sic Ambrosius: *Julianus Imperator quamvis esset apostata, habuit tamen sub se Christianos milites: quibus cum dicebat, producite aciem pro defensione reipublicæ, obediebant ei: [1]cum autem diceret eis, producite arma in Christianos, tunc agnoscebant Imperatorem cœli.* Sic et spiculatores legimus ad Christum conversos mori potius elegisse, quam edictis et judiciis in Christianos manum commodarent.

Vict. *de Jure Bell.* n. 23. 5 Tantundem erit si quis falso [1]persuasus sit quod imperatur injustum esse. Nam huic tantisper ea res pro illicita

[1] *Cum autem diceret eis, producite arma in Christianos*] Non enim ab omni vi in Christianos abstinuit Julianus, tunc maxime ubi colorem aliquem nactus sibi videbatur. *Julianus Christiani jugulator exercitus,* in Hieronymi scripto ad Nepotianum: [*Epitaph. Nepotian.* Tom. I. pag. 26 c. *Ed. Basil.*] cœptam ejus imperio Antiochiæ persecutionem, et juvenem quendam tortum, narrat Augustinus *de Civitate Dei,* Lib. XVIII. cap. 52. in martyrologiis memoria celebratur S. Eliphii Scoti et sociorum ejus 33. quos Julianus inter Tullensem et Grandensem civitatem decollari fecit. Vide et Joannem Antiochenum in excerptis ex manuscripto Peiresiano. (Pag. 842.) Augustinus *Epistola* L. ad Bonifacium citatus a Gratiano causa XI. quæst. iii: *Julianus exstitit infidelis Imperator: nonne exstitit apostata iniquus et idololatra? milites Christiani servierunt Imperatori infideli, ubi veniebant ad causam Christi non agnoscebant nisi illum qui in cœlo erat: quando volebat ut idola colerent et thurificarent, præponebant illi Deum.* [Laudatus locus jam supra Lib. I. cap. xi. § 10. num. 11. ubi vid. not.]

[1] Vocem illam *falso* addidi, quam sententia manifesto postulat, etsi in omnibus Editionibus desit. *J. B.*

[m] *Impunitatem concedunt obedientibus*] Chrysostomus *de Providentia* III.

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perform other military works, but could not be compelled to pile up earth to restore the temple of Belus. But we have a closer exception in the Theban legion under Julian, who were willing, as Ambrose says, to use their arms for the State, but not against Christians; when required to do this, they obeyed the King of heaven, not the emperor of earth. So we read that, of the soldiers whose office it was to execute the condemned, those who had been converted died rather than lay their hands on the Christians.

5 The rule is the same, if any one be falsely persuaded that what is commanded is unjust. The thing is unlawful for him, as long as he retains that opinion, as appears by what is said above.

IV. 1 But if the subject doubts whether the matter be lawful or not, must he remain quiet or obey [and assist in war?] Most writers

est, quamdiu eam opinionem non potest deponere: ut ex supra tractatis apparet.

IV. 1 Quod si dubitet, res licita sit necne, eritne quiescendum an parendum? Parendum plerique censent: nec obstare illud laudatum, Quod dubites ne feceris: quia qui contemplative dubitat potest activo judicio non dubitare: credere enim potest in re dubia obsequendum superiori. Et sane quin hæc distinctio judicii duplicis in multis actionibus locum habeat, negari non potest. Jura civilia, non Romanorum tantum, sed et aliarum gentium, in tali circumstantia non modo [m] impunitatem concedunt obedientibus, sed et actionem in eos civilem denegant. Is damnum dat, aiunt, qui jubet dare: ejus vero nulla culpa est, cui parere necesse est. Necessitas potestatis excusat, et similia.

L. Is damnum, 169. *De Reg. Jur. l. liber homo* 37. *D. ad l. Aquil. l. non videtur*, 167. § *qui juss.* 1. *de R. Jur. Paul. l.* v. *sen. tit.* 22. § 2. *Leges Longobar. lib.* i. *tit.* 26. *de termino effosso. Leges Wisigoth.* ii. *tit.* 11. c. 2. Lib. viii. *tit.* 1. c. 1, 3, 4. Lib. vii. *tit.* 4. c. 1. Cap. 12.

2 Ipse Aristoteles *Nicomachiorum* quinto, his qui injus-

πολλοὶ γοῦν ἀρχόντων ἐπὶ φόνοις ἀδίκοις κατηγορηθέντες, δίκην ἔδοσαν· τοὺς δὲ δημίους τοὺς διακονουμένους τῷ φόνῳ καὶ αὐτόχειρας γενομένους τῆς σφαγῆς, οὐδ' εἰς δικαστήριον ἑλκύσαι τις, ἀλλ' οὐδὲ ζητήσαι τὴν ἀρχὴν, τῆς ἀνάγκης ὑπὲρ αὐτῶν ἀπολογουμένης, καὶ τοῦ τῆς ἀρχῆς ἀξιώματος καὶ τοῦ τῆς ὑποταγῆς φόβου· *multi sæpe magistratuum ob injustas cædes accusati pœnas dederunt. At carnifices qui cædi ministerium, qui manuum operam præbuere, nemo in jus vocaverit, imo de iis ne quæsierit quidem: excusat enim eos necessitas ex dignitate jubentis et ex parentis timore.* (Tom. VI. pag. 870. *Ed. Savil.*) Ex Celso Ulpianus, *servum*, ait, *nihil deliquisse, qui domino jubenti obtemperavit.* Lib. 2. D. *de Nox. Act. Velle non creditur qui obsequitur imperio patris vel domini.* L. 4. D. *de Regulis juris*, et ibi Cujacius. Seneca: *In volente necessitas non est.* (*Epist.* 61.) Adde legem Longobardicam Lib. I. tit. iv. cap. 11. Mithridates libertos Attilii, conscios cædis in se cogitatæ, impunitos dimisit, et ejus qui a se defecerat filios. [Immo *filii amicos.* Pag. 241. *Ed. H. Steph.* et pag. 233.] Appianus Mithridatico. Absolutus Tiberius Gracchus a culpa Numantini fœderis, quoniam alieno imperio peccaverat. (Plutarch. pag. 826, 827.)

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think that he ought to obey. And they hold that the rule does not apply, *If you doubt do not do it.* Because he who doubts speculatively, may not be in doubt in his practical judgment. He may believe that in a doubtful matter he ought to obey his superior. And certainly, that this distinction of a twofold judgment, a speculative and a practical, holds in many actions, cannot be denied. Civil Laws, not those of the Romans only, but of other nations also, in such circumstances, not only grant impunity to those who obey, but also refuse a civil action against them. They say, he does the damage who orders it to be done; he is in no fault who is obliged to obey; the necessity imposed by authority excuses; and the like.

2 So Aristotle enumerates, among those who do an unjust thing,

tum quidem aliquid faciunt, non autem injuste, annumerat famulum domini imperantis: injuste autem eum ait agere, a quo actionis principium est; nimirum quia in famulo vis deliberatrix plena non est, ut indicat proverbium:

Ἥμισυ τῆς ἀρετῆς ἀποαίρει δούλιον ἦμαρ.

Dimidia virtute caret servire coactus.

Et simile[2]:

Ἥμισυ γάρ τε νόου ἀπαμείρεται εὐρύοπα Ζεὺς
Ἀνδρῶν οὓς ἂν δὴ κατὰ δούλιον ἦμαρ ἕλῃσι.

Tollitur huic hominum generi pars altera mentis
Ab Jove, servilem voluit quos ducere vitam.

Lib. Quod omn. Prob. sit liber, p. 871 D. Et illud quo Philo utitur:

Δοῦλος πέφυκας. οὐ μέτεστί σοι λόγου.

Servi tua est fortuna: [n]ratio ad te nihil.

Ann. vi. 8. Et illud Taciti: *principi summum rerum judicium Dii dederunt, subditis obsequii gloria relicta est.* Narrat idem *Ibid.* iii. 17. scriptor Pisonis filium a Tiberio crimine belli civilis purgatum: *patris quippe jussa, nec potuisse filium detrectare.* [o]Seneca: *servus herilis imperii non censor est, sed minister.*

Lib. xxii. 75. *cont. Faust.* 3 Et specialiter in hac de militia quæstione ita sensit

[2] Versus Homerici, quos tamen Auctor non ex ipso fonte, sed quales leguntur apud PLATONEM, *de Legib.* Lib. VI. pag. 777 A. *Ed. H. Steph.* heic refert. Nam ipse Poeta ita habet in Editionibus nostris:

Ἥμισυ γάρ τ' ἀρετῆς ἀποαίνυται εὐρύοπα Ζεὺς
Ἀνέρος, εὖτ' ἄν μιν κατὰ δούλιον ἦμαρ ἕλῃσιν.

Odyss. Lib. XVII. vers. 322, 323. [Lectionem Platonis habent et Athenæus et *Etymol. Magn.* Vid. Clark et Ernesti ad *h. l.* *M. T.*] Præcedentem autem versum hausit Auctor e LONGINO, *de Sublim.* § 43. nisi quod ibi legitur ἀποαίνυται. Rhetor etiam illum profert, tamquam ex Homero. *J. B.*

[n] *Ratio ad te nihil*] Themistius oratione IX. principes rationi esse dicit similes, milites iræ. (Pag. 197. *Edit. Petav.* 1618. ubi illud, quasi ex Platone,

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but do not act unjustly, the servant of the master who commands it; he says that he who in such case acts unjustly, is he in whom the origin of the action is. For in the servant, the power of deliberation is not complete. As in the proverb, and in Homer, *The day that makes man a slave takes half his worth away.* And so Philo, *You are a slave, what have you to do with reason?* So Tacitus. And the same writer narrates that Tiberius forgave the crime of Piso's son, who engaged in the civil war: because his father commanded, and the son could not refuse. So Seneca says, *The slave is not the critic, but the minister of the command.*

3 And especially in this question of acting as a soldier, Augustine so thought. He says, *A just man acting as soldier, even under a sacrilegious king, may rightly take a part in war at his command, if he be*

Augustinus. Sic enim ait: *Ergo vir justus, si forte sub rege etiam sacrilego militet, recte potest illo jubente bellare, si civicæ pacis ordinem servans, quod sibi jubetur, vel non esse contra Dei præceptum certus est, vel utrum sit, certus non est: ita ut fortasse reum faciat regem iniquitas imperandi, innocentem autem militem ostendat ordo serviendi.* Et alibi: *Miles cum obediens potestati sub qua legitime constitutus est hominem occidit,* [p] *nulla civitatis suæ lege reus est homicidii: imo nisi fecerit, reus est imperii deserti atque contemti: quod si sua sponte atque auctoritate fecisset, in crimen effusi humani sanguinis incidisset. Itaque unde punitur si fecerit injussus, inde puniretur si non fecerit jussus.* Atque hinc passim recepta est sententia, subditos quod attinet, dari bellum utrimque justum, id est injustitia vacans, quo illud pertinet[3]:

De Civ. Dei, i. 26.

Silv. *in Verb. Bell.* i. n. 9. *concl.* 4. Cast. *in l.* v. *D. de Just.* Soto, l. v. q. 1. art. 7. et q. 3. art. 3. Vict. *de Jure Bell.* n. 32. Covar. *in c. pecca t. part.* 2. § 10. Adr. *Quæst. quodl.* 2.

Quis justius induat arma
Scire nefas.

4 Non caret tamen hoc sua difficultate. Et Adrianus nostras, qui Cisalpinorum ultimus Pontifex Romanus factus est, [q] contrariam defendit sententiam, quæ stabiliri potest non

profert.)

[o] *Seneca*] *De Controversiis* III. 9.

[p] *Nulla civitatis suæ lege reus est homicidii*] Idem Augustinus *de Libero Arbitrio* libro I. *Si homicidium est hominem occidere, potest aliquando accidere sine peccato, nam et miles hostem, et judex vel minister ejus nocentem, et cui forte invito atque imprudenti telum de manu fugerit, non mihi videntur peccare cum hominem occidunt: sed nec etiam homicidæ isti appellari solent.* Retulit Gratianus in causæ XXIII. quæstionem V. (Ex cap. 4. dict. Lib.)

[3] Versus LUCANI, *Pharsal.* Lib. I. vers. 126, 127. *J. B.*

[q] *Contrariam defendit sententiam*] Exemplum hanc sequentium est apud Scafnaburgensem.

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certain that what is commanded is not against the precepts of God, or if he be not certain that it is so; the iniquity of the command may make the king guilty, but the rule of obedience may make the soldier innocent. And elsewhere, *A soldier, when he kills a man, obeying legitimate power, is not guilty of homicide. If he had done so without command, he would be liable to punishment; if he do not so under command, he is also liable to punishment.* And hence the opinion is everywhere received, that so far as subjects are concerned, there may be wars which are just on both sides, that is, free from injustice. So Lucan.

4 But this matter is not without difficulties of its own. Adrian our countryman, who was the last Cisalpine Pope, defends the contrary opinion. And it may be supported, not precisely on that ground which he adduces, but on this which is more satisfactory, that he who

illa præcise ratione quam ille adfert, sed hac quæ magis urget, quod qui dubitat contemplative, debeat judicio activo eligere partem tutiorem. Est autem[4] pars tutior abstinere bello.

Joseph. *Bell. Jud.* ii. 8. § 7.

Laudantur Esseni quod inter alia jurarent *μὴ βλάψειν τινὰ μήτε ἐξ ἐπιτάγματος· non nocituros se cuiquam, ne si juberentur quidem*: imitatores horum Pythagorei, qui, Jamblicho teste, bello abstinebant, causa addita, quia *φόνων χορηγέτης καὶ νομοθέτης ὁ πόλεμος, bellum cædes subministrat atque imperat.*

De Vit. Pythag. § 186.

5 Neque obstat quod ex altera parte periculum est inobedientiæ. Nam cum utrumque incertum sit (nam si injustum est bellum, jam in ejus vitatione nihil est inobedientiæ) caret peccato, quod ex duobus minus est. Inobedientia autem in ejusmodi rebus suapte natura minus malum est quam homicidium, præsertim multorum innocentium. Narrant veteres cum Mercurius ob Argum interfectum accusatus Jovis mandato se defendisset, [5]non tamen ausos Deos eum absolvere. Sed nec Pothinum Ptolemæi satellitem Martialis, cum ait:

Bald. ii. *cons.* 385. Sotus *de det. secr. membr.* 3. q. 2. *in resp. ad* 1.

Lib. iii. *Epig.* 66.

> Antoni tamen est pejor quam caussa Pothini:
> Hic facinus domino præstitit, ille sibi.

Nec magni ponderis est quod contra nonnulli adferunt, fore

Vict. *de Jure Belli*, n. 25.

[4] Bene quidem, ubi libertas relinquitur subditis militandi, vel non militandi. At vero ubi necessitas imponitur jussu Principis, tunc pars tutior est, ei parere, cui parendum esse nulla dubitandi ratio est, quippe legitimo Imperanti. Plura diximus in Notis nostris Gallicis. *J. B.*

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doubts speculatively ought in practice to choose the safer side. And the safer side is, to abstain from war*. The Essenes are praised for swearing that *they would not harm any one, even if they were commanded.* And so are their imitators the Pythagoreans, who abstained from war, as Jamblichus says, adding for cause *that war produces bloodshed.*

5 Nor is it a sufficient objection to this, that on the other side there is the danger of disobedience. For when the right and wrong is uncertain (for if the war be unjust, there is no [moral] disobedience in declining it,) then disobedience is free from sin, and this is the less of two evils. Disobedience in such a case is a less evil than homicide, and especially, than the homicide of many innocent persons. So the ancients say that the gods would not absolve Mercury for the death of Argus, though done by the command of Jupiter†. And so Martial condemns Pothinus the attendant of Ptolemy, who put him to

* Barbeyrac says the safer side may be to obey: but Grotius is speaking of the danger of being morally wrong, not of danger to outward fortunes. W.

† Barbeyrac remarks, that the example is not pertinent.

ut id si admittatur pereat sæpe respublica; quia plerunque non expediat rationes consiliorum edi populo. Ut enim hoc verum sit de causis suasoriis belli, de justificis verum non est, quas oportet claras esse et evidentes, et proinde tales quæ palam exponi et possint et debeant.

6 Quod de legibus nimis forte indistincte dictum a Tertulliano est, in his legibus sive edictis de bello gerendo locum justissime habet: *neque civis fideliter legi obsequitur, ignorans quale sit quód ulciscitur lex: nulla lex sibi soli conscientiam justitiæ suæ debet, sed eis a quibus obsequium exspectat. Ceterum suspecta lex est, quæ probari se non vult: improba autem, si non probata dominetur.* Apud Papinium Achilles Ulyxi se ad bellum excitanti ait (*Achilleid.* Lib. II. vers. 332): *Apol. c. 4. 1. advers. Nat. c. 6.*

> Quæ Danais tanti primordia belli,
> Ede: libet justas hinc sumere protinus iras.

Apud eundem Theseus (*Theb.* XII. 648):

> Ite alacres, tantæque precor confidite causæ.

Propertius dixerat (Lib. IV. *Eleg.* VI. vers. 51, 52):

> Frangit et attollit vires in milite causa:
> Quæ nisi justa subest, excutit arma pudor.

[5] Nescio cujus fide hoc referat Auctor: sed cuivis statim patet, exemplum aptum non esse, ut etiam observavit Obrechtus, quandoquidem Jovis mandatum injustum erat, et tale a Mercurio non poterat non adgnosci. *J. B.*

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death, as worse than Antony who commanded the act. Nor is that of much weight which is alleged on the other side; that if such a rule were adopted, the state would often be damaged, since generally it is not expedient to publish to the people the grounds of public acts. For however true this may be of the impelling causes of war, it is not true of the justificatory causes, which should be clear, and such as both may and ought to be openly expounded.

6 What Tertullian says, somewhat indistinctly, of laws in general is very just with regard to laws or edicts for making war: *A citizen does not obey the laws faithfully if he be ignorant at what crime the punishment of the law is aimed. The law may not be content with its own conscience; it owes a justification to those for whom it claims obedience. A law is suspected, which does not seek moral approbation; it is bad, if, being examined, it is not approved.* So in the *Achilleïs* of Statius, Achilles requires Ulysses to instruct him of the justice of the Greek cause. And in his *Thebaïs*, Theseus bids his followers to go forwards, confiding in their just cause. So Propertius had said that the soldier's courage rises and falls with his cause; and that if that be not just, his

Nazar. *Paneg. Constantin.* c. 7, ed. Cellar.

Cui par illud Panegyristæ: *tantum etiam inter arma bona conscientia sibi vindicat, ut jam cœperit non virtutis magis quam integritatis esse victoria.* Ac sic viri quidam eruditi interpretantur ירק quod legitur [r]Gen. xiv. 14, ut sensus sit, ministros Abrahami ante prælium ab ipso plene institutos de armorum suorum justitia.

7 Et sane denuntiationes, ut mox infra dicemus, palam fieri solebant et expressa causa, ut totum quasi genus humanum de justitia causæ posset cognoscere. Scilicet prudentia virtus est, ut et [6]Aristoteli visum, imperantis propria: justitia vero hominis qua homo est.

Ægid. *Reg. de act. sup. disp.* 31. *dub.* 5. n. 85. Bannes 2, 2. q. 40. art. 1. Molin. *tr.* 2. *disp.* 113.

8 Omnino autem sequenda videtur ea quam diximus Adriani sententia, si subditus non modo dubitet, sed argumentis probabilibus inductus magis in id propendeat ut bellum injustum esse putet: præcipue vero si de aliis impetendis, non de suis tuendis agatur.

9 Quin probabile est, etiam carnifici qui damnatum occi-

[r] *Genesis* xiv. 14] Quidam in eundem sensum trahunt vocem חניכיו et interpretantur *a se institutos.* Herodes in oratione ad Judæos post cladem in Arabia, apud Josephum: *βούλομαι δὲ πρῶτον μὲν ὑπὲρ τοῦ πολεμεῖν ὡς δικαίως αὐτὸ ποιοῦμεν, ἐπιδεῖξαι, διὰ τὴν ὕβριν τῶν ἐναντίων ἠναγκασμένοι· μέγιστον γὰρ, εἰ μάθοιτε τοῦτο, προθυμίας αἴτιον ὑμῖν ἔσται· volo autem ostendere vobis quam juste susceperimus hoc bellum, coacti inimicorum contumeliis. Id enim si intellexeritis, magnum vobis ad audendum erit incitamentum.* (*Antiq. Jud.* Lib. xv. cap. v. § 8. *division. Hudson.*)

arms are blunted. And so that Panegyrist says, that conscience has so great a power in arms, that victory depends more upon integrity than upon courage. And so some learned men interpret what is said of Abraham's arming his servants, to imply that he instructed them of the justice of his cause, Gen. xiv. 14.

7 And in fact, declarations of war used to be made, as we shall have to say hereafter, accompanied by a declaration of the cause of the war; that the whole human race, as it were, might judge of its justice. And as Aristotle says, prudence is properly the virtue of a ruler, but justice is a virtue which belongs to man as man.

8 But undoubtedly the opinion of Adrian which we have mentioned seems fit to be followed, if the subject not only doubts of the justice of the cause, but, induced by probable arguments, rather inclines to believe the war unjust: especially if the question be of attacking others, not of defense.

9 It is also a probable opinion that an executioner who is to put a man to death, ought to know that there is a cause in his deserts for doing so; either as having been aware of the trial and proofs, or

surus est, hactenus, aut quod quæstioni et actis interfuerit, aut ex rei confessione cognita esse debere causæ merita, [8]ut satis ei constet mortem ab eo commeritam: idque nonnullis in locis observatur: nec aliud spectat lex Hebræa, cum ad lapidandum eum qui damnatus est testes vult præire populo. *Deut.* xvii. 7.

V. 1 Quod si subditorum animis per causæ expositionem satis nequeat fieri, omnino officium erit boni magistratus tributa ipsis potius extraordinaria imperare, quam operam militarem: præsertim ubi non defuturi sunt alii qui militent: quorum voluntate non tantum bona, sed et mala uti potest rex justus, quomodo Deus et Diaboli et impiorum parata opera utitur; et sicut culpa caret qui egestate pressus pecuniam sumit ab improbo fœneratore. Silv. *in Verb. Bell.* p. 1. n. 7. *circa fin.*

2 Imo etiam si de causa belli dubitari non possit, minime tamen videtur æquum ut Christiani inviti cogantur militare, [7]cum a militia abstinere, etiam cum militare liceat, majoris cujusdam sit sanctitatis, quæ et a clericis et a pœnitentibus

[6] Ἡ δὲ φρόνησις ἄρχοντος ἴδιος ἀρετὴ μόνη. *Politic.* Lib. III. cap. iii. [cap. ii. § 11. *Stahr.*] *J. B.*

[8] *Ut satis ei constet mortem ab eo commeritam*] Ideo indicta causa sacerdotes Nobæ habitantes occidere noluere Saulis ministri Doego probiores, I. Sam. xxii. 17. Et Achabi spiculator tertius nocere Eliæ noluit, II. Regum i. 13. et sequentibus. Aliquot etiam carnifices ad Christum conversi in posterum eo munere ut periculoso abstinuere. Vide *Martyrologium*, et Bedam, *l.* I. cap. 7.

[7] Heic et in præcedentibus non satis accurate Auctorem nostrum ratiocinari, ostendimus in Notis nostris Gallicis. *J. B.*

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by the confession of the criminal. And this is observed in some places; and to this the laws of the Hebrews seem to have regard, when, in the stoning of a condemned person, it directs the witnesses to begin the execution.

V. 1 But if the minds of the subjects cannot be satisfied by the exposition of the cause, it will by all means be the part of a good magistrate rather to impose extraordinary contributions upon them, than military service; especially as it is to be supposed that persons willing to serve as soldiers will not be wanting; whose acts, not only if they are morally good, but even if they are bad, a just king may use; even as God makes use of the spontaneous acts of the devil and of impious men; and as he is free from fault, who being in pecuniary distress, takes money from a wicked usurer.

2 And even if there can be no doubt as to the justice of the war, it does not seem at all equitable that Christians who are unwilling should be compelled to act as soldiers; when we consider that to abstain from military service, even when such service is lawful, is the course

diu exacta est, aliis vero omnibus multis modis commendata. Origenes Celso Christianis objectanti militiæ detrectationem Contr. Cels. viii. p. 427. sic respondet: *his qui a fide alieni pro republica militare nos jubent, et homines occidere, ita respondebimus: Hi qui simulacrorum vestrorum sunt sacerdotes, et deorum quos putatis flamines, dextras puras servant sacrificiorum ergo, ut ea incruentis et nulla cæde maculatis manibus offerant his qui creduntur dii: neque si quod exoriatur bellum sacerdotes asscribuntur numeris. Quod si id ratione non caret, quanto magis ceteris militantibus, illi quoque suo modo censendi sunt militare, tanquam Dei sacerdotes atque cultores, qui manus quidem servant puras, sed precibus apud Deum certant pro his qui juste militant, et pro eo qui juste regnat?* quo in loco sacerdotes vocat quosvis Christianos, exemplo sanctorum scriptorum, Apoc. i. 6; 1 Pet. ii. 5.

VI. 1 Arbitror vero evenire etiam posse, ut in bello non dubio tantum sed et manifeste injusto justa aliqua esse possit subditorum defensio. Nam cum subditos innocentes, et a belli culpa remotos, interficiendi jus verum et internum hostis, justum quamvis bellum gerens, non habeat, nisi aut ad necessariam defensionem, aut per consequentiam et extra propositum, (pœnæ enim illi obnoxii non sunt) sequitur ut si certo constet hostem eo venire animo, ut hostilium subdito-

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directed by especial holiness, such as was long exacted of ecclesiastical persons and penitents, and strongly recommended to all others in many ways. Origen, answering the objection of Celsus to the Christians, that they declined military service, says: *Those who require this, we remind of the priests of the heathens, who were bound to keep themselves pure from the shedding of human blood; and this ought still to be the rule for those who are all priests of God. They in their prayers to God wrestle for them who fight justly, and for him who reigns justly:* where he calls all Christians *priests*, following the Scriptures, Rev. i. 6; 1 Pet. ii. 5.

VI. 1 I think however that it may happen, that in a war not doubtful, but even manifestly unjust, there may be a just defense of the subjects who take a part in it. For since the enemy, though carrying on a just war, has not a true and intrinsic right to kill innocent subjects, who have nothing to do with the fault of the wars, except either for necessary defense, or by consequence and extrinsically to his purpose; (for they are not liable to punishment;) it follows that if it be clear that the enemy comes with such a purpose

rum vitæ parcere cum possit, omnino nolit, subditi illi tueri se possint ex jure naturæ, quod gentium jure ademptum illis non est.

2 Neque tunc dicemus bellum utrinque justum esse: non enim de bello, sed de certa ac definita actione quæritur. Illa autem actio, quamvis de cetero jus ad bellum habentis, injusta est, et proinde juste repellitur.

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that though he could save the lives of the subjects of his adversary, he will not; those subjects may defend themselves by the law of nature, which they are not divested of by the law of nations.

2 Nor shall we then say that the war is just on both sides; for the question is not concerning the justice of the war, but concerning a certain and definite action of the enemy. And this action, though it be the action of a person having in other respects a right of making war, is unjust, and therefore may be justly repelled.

END OF VOLUME II.